

# Indiana Law Review



Volume 34 No. 3 2001

## 2000 SURVEY OF RECENT DEVELOPMENTS IN INDIANA LAW

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*Earl G. Penrod*

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*Mary Margaret Giannini*



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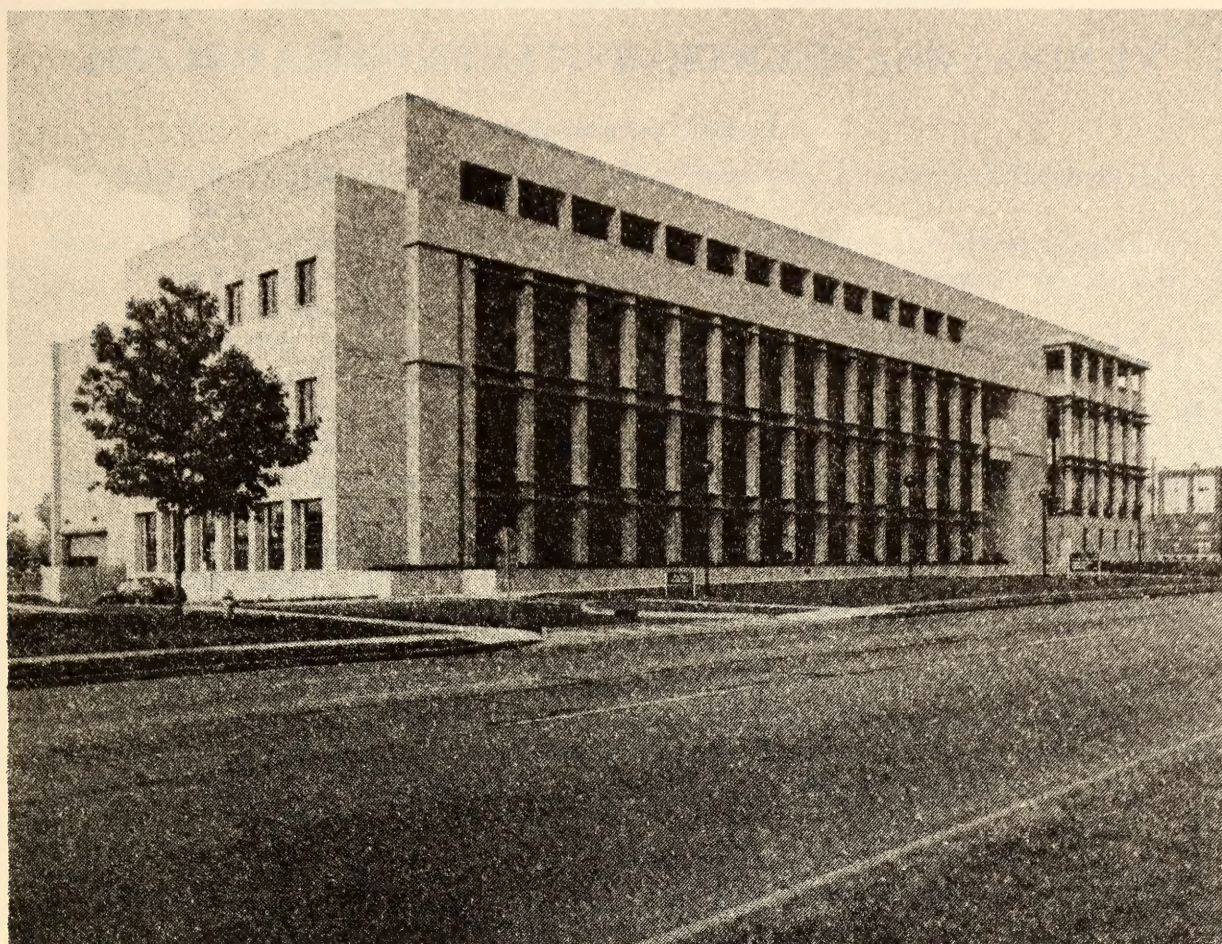
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# BUILDING INDIANA'S LEGAL PROFESSION

RANDALL T. SHEPARD\*

Surely one of the hallmarks of a profession is that it continually reforms the ways it seeks to achieve its core objectives in light of changing conditions. This has been one of the objectives of the Indiana Supreme Court in recent initiatives taken in cooperation with the practicing bar and the academy.

I focus here on three important reforms aimed at building the professionalism of our state's legal community. First, we have made the first organic changes in the bar admissions process since Indiana began giving a bar examination in the 1930s. Second, we have launched a nationally recognized project to expand pro bono representation at the grass roots level. Third, we have made major strides in improving the legal service afforded indigent defendants in criminal cases, especially in capital cases.

## I. BAR ADMISSIONS: LAWYERS AS PROBLEM-SOLVERS

For much of America history, it was customary for people to become lawyers without taking a bar examination or even going to law school.<sup>1</sup> In Indiana, this policy took the form of a constitutional provision that entitled any person of "good moral character" to apply to the courts for admission to the bar.<sup>2</sup> After a considerable struggle and multiple referenda, the voters deleted this provision in 1932,<sup>3</sup> and the Indiana Supreme Court began licensing lawyers who had attended law school and passed a bar examination.<sup>4</sup> Our Board of Law Examiners now gives the examination to some 720 applicants each year, passing about 600 of

---

\* Chief Justice of Indiana. A.B., 1969, Princeton University; J.D., 1972, Yale Law School; LL.M., 1995, University of Virginia.

1. "In 1922, there was not one state that required attendance at law school." ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1980'S* 172 (1983). By 1987, there were only three states (Indiana, Georgia, and California) that permitted individuals to take the bar examination without graduating from a fully accredited law school. See Randall T. Shepard, *Classrooms, Clinics and Client Counseling*, 18 OHIO N.U.L. REV. 751 (1992). Indiana abolished this avenue of admission in 1993. See IND. ADMISSION AND DISCIPLINE RULE 13(V)(A) (amended effective Jan. 1, 1993).

2. The provision said: "Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice." IND. CONST. art. VII § 21 (1816). It was the phrase "being a voter" that had served as the barrier to admitting women, until the Indiana Supreme Court's decision in *In re Leach*, 34 N.E. 641 (1893).

3. The validity of the amendment that deleted Article VII, section 21, was confirmed in an opinion written by Justice Walter E. Treanor. *In re Todd*, 193 N.E. 865 (Ind. 1935).

4. In 1931, the General Assembly enacted a provision giving the Indiana Supreme Court "exclusive jurisdiction to admit attorneys to practice law in all courts of the state under such rules and regulations it may prescribe." Act of Mar. 5, 1931, ch. 64 § 1, 1931 Ind. Acts 150. Pursuant to this authority the supreme court adopted a rule requiring bar applicants to take an examination "to determine his professional fitness." S. Hugh Dillin, *The Origin and Development of the Indiana Bar Examination*, 30 IND. L. REV. 391, 393 (1997). The statutory provision has since become a constitutional rule. IND. CONST. art. VII, § 4.



them.<sup>5</sup>

We view this admissions regime as resting largely on two foundations. The first is consumer protection. The legal environment in which clients find themselves grows ever more complex and pervasive, and the talent of lawyers who serve them must rise to the occasion. The requirements of graduation from an accredited law school, success on the examination, and certification of character and fitness help assure that only persons who meet a given minimum level of competency are "turned loose" on clients, many of whom are ill-equipped to evaluate the capabilities of lawyers whom they engage.<sup>6</sup> The second support for this regime is the public trust and confidence of the legal profession. A healthy and helping legal profession constitutes a central pillar in public support for the rule of law.<sup>7</sup>

To further these two interests, the Indiana Supreme Court began an examination of the examination. The end product of this review was the administration of two tests new to our examination arrangements, the Multistate Bar Examination (MBE) and the Multistate Performance Test (MPT), each given for the first time in February 2001. Both tests are products of the National Conference of Bar Examiners (NCBE). Founded in 1931, NCBE is a non-profit corporation whose mission is to "assist bar admission authorities by providing standardized examinations of uniform and high quality for the testing of applicants for admission to the practice of law . . . ."<sup>8</sup> Almost every jurisdiction in the United States utilizes at least one of the four examinations they provide. In addition to the MBE and the MPT, NCBE also offers the Multistate Essay Examination (MEE) and the Multistate Professional Responsibility Examination (MPRE).<sup>9</sup> The NCBE also publishes quarterly *The Bar Examiner*, a journal containing updates in various substantive and procedural areas of testing.<sup>10</sup>

Our court first took an interest in the MPT at a time when just a handful of states had adopted it. Our interest derived from the emphasis of the test on the problem-solving abilities of prospective lawyers. The traditional bar examination has been structured reasonably well for testing an applicant's knowledge of

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5. In 1998, 668 applicants took the Indiana Bar Examination, 583 passed. In 1999, of the 722 applicants, 572 passed. In 2000, there were 770 applicants, of which 649 passed.

6. Persistent grade inflation at the law schools makes the examinations even more important in this regard. See Deirdre Shesgreen, *Making the Grade: The Rising (Grade) Inflation Rate*, LEGAL TIMES, July 29, 1996, at 2; Karen Hall, *Paper Chase*, AM. LAW., Aug. 1999, at 24; Jonathan Yardley, *The High Cost of Grade Inflation*, WASH. POST, June 16, 1997, at C2.

7. See Randall T. Shepard, *Lawyer-Bashing and the Challenge of a Sensible Response*, 27 IND. L. REV. 699 (1994).

8. National Conference of Bar Examiners Mission Statement, available at <http://www.ncbex.org/AboutNCBE.htm> (last visited May 8, 2001).

9. The Indiana Supreme Court decided to add the MPRE as a bar admission requirement in 1991. IND. ADMISSION AND DISCIPLINE RULE 17, amendment of Sept. 3, 1991, in 574-76 N.E.2d XXXIII (1991).

10. This journal recently featured an article on the Indiana CLEO program. See Randall T. Shepard, *The Indiana CLEO Program*, BAR EXAMINER, Nov. 2000, at 38.



substantive law.<sup>11</sup> Of course, this is largely what most law school examinations do. Our court concluded that the bar admission examination should place greater emphasis on an applicant's capacity for solving client problems. The MPT is structured to test an applicant's ability to use basic lawyering skills in a realistic situation. It consists of three ninety-minute skills questions that cover legal analysis, fact analysis, problem solving, resolution of ethical dilemmas, organization and management of a lawyering task, and communication. For example, applicants may be instructed to draft a memorandum, brief, contract, or will; write a statement of facts or closing argument; devise a counseling plan, a proposal for settlement, a discovery plan, or a witness examination plan.

While we were examining whether to add the MPT, the court thought it would be timely to reexamine the possible use of the Multistate Bar Examination. It was NCBE's first test, created in 1973.<sup>12</sup> The MBE quickly became a national norm, such that when our court last considered adopting it in 1987, forty-six states already used it as part of their examination system.

The MBE is a six-hour test of legal knowledge, containing two-hundred multiple-choice questions, covering contracts, torts, constitutional law, criminal law, evidence, and real property. The MBE is structured to test an individual's ability to apply fundamental legal principles rather than local statutory or case law. It typically gives applicants a fact pattern and instructs them to analyze legal relationships or to take a position as an advocate. An applicant may provide only one answer to each question and is encouraged to answer every question because scores are based on the number answered correctly.

After several months of study, our Board of Law Examiners recommended that we make both the MPT and MBE part of Indiana's system. Regarding the MBE, the board observed that the examination will ensure an understanding of general legal principles, especially in light of the fact that many "traditional courses" are no longer required for graduation.<sup>13</sup> The board also noted that administering the MBE would increase the "portability" of Indiana lawyers because twenty-seven other states accept MBE scores from another jurisdiction. Thus, an Indiana lawyer seeking a Wisconsin license could more easily obtain it. Likewise, an Indiana firm hiring a young lawyer from Illinois could more easily get that lawyer licensed here.

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11. Indiana's examination, at the time we made the decision, covered the following subjects: administrative law, business organizations, commercial law, federal and Indiana constitutional law, contracts, criminal law and procedure, evidence, family law, pleading and practice, personal and real property, taxation, torts, and wills, trusts and estates.

12. See Beverly Tarpley, *NCBE Introduces New Feature to Bar Exam*, A.B.A. SYLLABUS, Mar. 1998, at 8.

13. Students attending Indiana law schools are only required to take six of the fifteen subjects previously tested on the bar examination. These subjects include: federal constitutional law, property, civil procedure, contracts, criminal law and torts. See IND. UNIV.-BLOOMINGTON SCH. L. ACAD. REG. & SELECTED POLICIES 1 (2000-2002); IND. UNIV.-INDPLS. SCH. L. STUDENT HANDBOOK 1-2 (2000); NOTRE DAME L. SCH. BULL. INFO. 8 (2000-2001); VAL. U. SCH. L. BULL. 49-50 (2000-2001).



In addition to portability, I believed that the regular validation of the MBE was a benefit of adding the test. The National Conference takes rather seriously, for example, the need to assure that the test is not skewed against minority bar-takers, and it conducts regular assessments of the test for this purpose.<sup>14</sup> A 1994 assessment of the MBE confirmed the validity and reliability of the examination and observed that "the test appears to be fair to all takers regardless of gender, race, or ethnicity."<sup>15</sup> The best known assessment is the so-called Bar Passage Study conducted by the Law School Admissions Council, which sponsors the LSAT and other admissions activities. While it took into account other factors such as local tests, the Bar Passage Study concluded that minority students eventually pass bar examinations in proportions roughly equivalent to their performance in law school.<sup>16</sup>

This aspect of adopting the MBE thus compliments our efforts during the past year to make our bar more accessible to minority law students. The centerpiece of Indiana's program, of course, has been the Indiana Conference on Legal Education Opportunity, launched with the passage of legislation during 1997.<sup>17</sup> The first CLEO students attended a summer institute during the summer of 1997 within a few weeks after the Governor signed the CLEO bill into law. These students were ready to graduate in May 2000, and the CLEO Advisory Committee began to investigate how we might assist those students in the challenge of passing the bar examination.

We eventually authorized the CLEO program to pay the full cost for one of the professional bar review courses. We also organized four separate review sessions that focused on writing successful examination answers. The net results of this effort were encouraging. Of the seventeen CLEO students who sat for the July 2000 Indiana bar examination, twelve passed either on first grading or on appeal to the Board of Law Examiners. Still, as one might have expected based on past bar passage studies, this rate was lower than the rate for all first-time takers in the same cycle, which was eighty-four percent.<sup>18</sup>

Attempting to improve on these results, I invited several score Indiana bar leaders to a meeting in November 2000 to hear a presentation by representatives of Minority Legal Education Resources (MLER), a non-profit organization in Chicago that seeks to improve the bar passage rate of minority law students. Created in 1975, the MLER program is operated by volunteer attorneys who provide educational services, professional guidance, and emotional support to minority bar candidates. Because the program concentrates on teaching study

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14. Rachel Slaughter et al., *Bar Examinations: Performance or Multiple Choice?*, BAR EXAMINER, Aug. 1994, at 7.

15. *Id.* at 14.

16. Katherine L. Vaughns, *LSAC's National Study Findings on Bar Passage Rates: Do They Augur the End of Old Debates and Controversies About Discrepancies in Bar Passage Rates Among Ethnic Groups?*, BAR EXAMINER, Nov. 1998, at 19.

17. Pub. L. No. 202-1997, § 3 (codified at IND. CODE § 33-2.1-12-2) (Supp. 2000)).

18. In July 2000, there were a total of 488 first-time takers of the Indiana Bar Examination, of which 412 passed.



methods and exam-taking techniques, MLER is intended to supplement a formal bar review course. In a few cases, however, the program has offered substantive tutoring.

The program consists of six weekly sessions that last about three hours each. Students work in small groups of eight or nine people, including an instruction leader and two assistants. The students in these groups take practice exams, review graded examinations and discuss relevant topics that arise. The program also endeavors to train students how to study "actively," by reading and listening to legal material while integrating it into a useful framework of analysis. The turnout and the enthusiasm of this meeting were considerable, and I hope that 2001 will produce an Indiana version of MLER.

## II. LAUNCHING THE INDIANA PRO BONO SYSTEM

Indiana is on its way to having the best organized, most widely embraced, and best financed pro bono program in the nation. We are the only state where fostering pro bono efforts is the central feature of the Interest on Lawyer Trust Accounts program.<sup>19</sup> During the past year, the Indiana IOLTA program began generating funds in earnest, under the auspices of the Indiana Bar Foundation. By the end of 2000, the Foundation was collecting interest at the rate of \$77,000 a month.<sup>20</sup> Some of this income, of course, will go to cover the Foundation's own costs in managing the IOLTA part of the IOLTA/Pro Bono effort. In addition, the Indiana Supreme Court's designation of the Foundation as the IOLTA sponsor provides incentives for maximizing the amount of funds raised for pro bono and permits the funds earned under these incentives to be used in support of the Bar Foundation's other charitable purposes.<sup>21</sup>

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19. Indiana Professional Conduct Rule 1.15(d)(8) provides:

All [IOLTA] interest transmitted to the [Indiana Bar] Foundation shall be held, invested and distributed . . . for the following purposes:

- (A) to pay or provide for all costs, expenses and fees associated with the administration of IOLTA program;
- (B) to establish appropriate reserves;
- (C) to assist or establish approved pro bono programs as provided in Ind.Prof.Cond.R. 6.5;
- (D) for such other programs for the benefit of the public as are specifically approved by the Supreme Court from time to time.

IND. PROF'L CONDUCT RULE 1.15(d)(8).

20. As of January 5, 2001, the Indiana Bar Foundation had deposited \$77,000 of IOLTA interest earned during the month of December 2000. Rachel McGeever, Remarks at the Meeting of the Indiana Pro Bono Commission (Jan. 8, 2001).

21. The Indiana Bar Foundation has a strong financial incentive to maximize returns to the Pro Bono Commission while holding down its own costs in collecting IOLTA interest. The Foundation will receive a payment of seventeen percent of the amount that is made available to finance the recommendations and administrative expenses of the Pro Bono Commission. Thus, the formula incentive payment to the Foundation is: (Interest Earned—Trust Account Costs) x



While this financial commitment makes Indiana unique, the best story of the past year is what the funds will do for people who need legal help. The remarkable activity set in motion by Indiana Admission and Discipline Rule 23(21)(c), the writing of pro bono plans in each of Indiana's fourteen judicial districts, has put us on a new path. In each district, the Supreme Court appointed a trial judge to lead this planning and organizing effort. Each of these judges assembled a committee consisting of local bar leaders, people active in pro bono programs, law school representatives where there were schools in the district and other judges. A typical committee has seventeen members.<sup>22</sup> Each committee undertook to assess the present state of pro bono in the counties of the district and devise a plan for improving the recruitment of lawyers, their training and placement, matching the intake of clients with the available lawyers, and so on. Where this required money, as usually it does, the district committee formulated a budget.

The plans for District Seven (an area around Clay and Putnam Counties) and District Thirteen (covering the area around Vanderburgh County) illustrate these efforts. The Seventh District Committee determined that the most formidable barrier to accessing justice within the district was "the lack of a formal pro bono delivery program and corresponding lack of attorneys committed to addressing the legal needs of [the poor]."<sup>23</sup> The committee identified this hurdle after examining the number of residents denied assistance from Legal Services Organization of Indiana, Inc. (LSOI) not due to ineligibility, but due to a lack of LSOI resources.<sup>24</sup> The committee also determined the percentage of people in

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seventeen percent. For example, if the Foundation raised \$100,000 in a year with costs of \$15,000, the Foundation would receive seventeen percent of the difference, or \$14,450. This would leave \$70,550 to fund the Pro Bono Commission's district plans. See *In re Ind. Prof'l Conduct Rule 1.15(d)(8)*, No. 94S00-0005-MS-331 (Ind. 2000).

22. For example, the Ninth District which includes Fayette and Franklin counties has the following committee members: Chairman Gregory A. Horn, Superior Court Judge, James R. Williams, Circuit Court Judge, Robert L. Reinke, Senior Judge, Brandon Griffis, Retired Superior Court Judge, Michael A. Douglass, Esq., Mary Butiste Jones, Esq., Amy Noe, Esq., John F. Strain, Esq., Stacie Terry, Esq., Courtney Laughlin, Paralegal, and six community at large members. See INDIANA PRO BONO COMM'N, DISTRICT NINE 2000 ANNUAL PRO BONO REPORT AND PLAN (2000).

23. IND. PRO BONO COMM'N, DISTRICT SEVEN 2000 ANNUAL PRO BONO REPORT AND PLAN 20 (2000).

24. *Id.* LSOI was a not-for-profit organization that provided free legal services for low income people in Central and Southern Indiana. Legal services provided by LSOI included civil matters that are not fee generating, such as: housing, public benefits, health, divorce, Children in Need of Services (CHINS), consumer, education and access to justice. Applications for assistance were accepted in person and by telephone. An attorney reviews each application. The LSOI income criterion for eligibility was based on 125% of federal poverty. Due to its limited staff and numerous applications from financially eligible applicants, LSOI further prioritized requests and determined need for immediate assistance. See *id.* at 8-9. LSOI has now been succeeded by Indiana Legal Services, Inc, which serves clients in much the same way.



poverty in each of the district's counties, which ran as high as fifteen percent.<sup>25</sup>

The committee proposed several actions to address the crux of the problem, lack of pro bono attorneys. It first plans to develop a brochure that both explains its pro bono plan and requests attorneys to indicate their primary area of practice. The committee will solicit from the attorneys which counties they are willing to serve. It will also inquire which attorneys are willing to mentor, train, conduct clinics, speak to other organizations or compile form books as a part of their pro bono efforts. The district's plan declares the involvement and support from local judges and bar associations essential to reaching its goals.

The Thirteenth District Committee concluded that access to justice in its district was hindered by a lack of administration.<sup>26</sup> Specifically, the committee indicated a need for a plan administrator to provide, among other things, "implementation and oversight of the District Plan on a daily basis."<sup>27</sup> It also expressed a need to provide access to legal services "cheaply and swiftly."<sup>28</sup> The committee explains that funds from the Pro Bono Commission are key to solving these problems.

In addition to hiring a plan administrator, financial assistance from IOLTA/Pro Bono will enable the committee to establish a toll-free telephone number "by which every indigent individual anywhere in the District might initially access the pro bono service in the least complicated manner."<sup>29</sup> The committee also plans to initiate a current legal needs study in order to "identify and prioritize pro bono legal services."<sup>30</sup> It will accomplish this by conducting, compiling and interpreting original surveys.<sup>31</sup>

These local efforts have been coordinated by the Indiana Pro Bono Commission. It is a vehicle of the Indiana Bar Foundation, created in accordance with Indiana Professional Conduct Rule 1.15(d)<sup>32</sup> and chaired by Judge L. Mark Bailey of the Indiana Court of Appeals. At the close of 2000, the Commission recommended to the Bar Foundation the distribution of the first \$300,000 in IOLTA funds to begin implementing the local plans.<sup>33</sup>

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25. *Id.* at 21. The percentage of people in poverty in each county were as follows: Vigo, 15.1%; Putnam, 9.3%; Clay, 10.7%; Sullivan, 12.9%; Parke, 12.2%; Vermillion, 11.3%.

26. IND. PRO BONO COMM'N, DISTRICT 13 PRO BONO 2000 ANNUAL REPORT AND PLAN 5 (2000).

27. *Id.*

28. *Id.*

29. *Id.* at 6.

30. *Id.* The existing Legal Needs Study was published in 1992 and has not yet been updated. See LEGAL NEEDS STUDY OF THE POOR IN INDIANA: EXECUTIVE SUMMARY (Legal Services Organization of Indiana, Inc. and United Way/Community Service Council of Central Indiana, Inc., Feb. 1992).

31. *Id.*

32. Ind. Professional Conduct Rule 1.15(d) states: "[A] lawyer or law firm shall create and maintain an interest-bearing trust account for clients' funds which are nominal in amount or to be held for a short period of time (hereinafter sometimes referred to as an "IOLTA account") . . . ."

33. The Commission gave every district \$5000. Additional funds were granted to each



We are still at the beginning of this story, but Indiana is clearly on a path that others find interesting. The Illinois Pro Bono Center ran an article in its publication, *Equal Access*, in which the author described Indiana's pro bono initiative as "new and exciting."<sup>34</sup> The American Bar Association has published articles discussing both the Indiana Pro Bono System and IOLTA in its publication entitled *Dialogue*.<sup>35</sup> The Indiana press has also taken notice.<sup>36</sup> A columnist for the Indianapolis Star noted that pro bono effort has fallen off in some other parts of the country, but observed our pro bono programs have set an example for other states.<sup>37</sup> Observing that our commission's executive director used to hide her face at national meetings, the author noted: "Now she proudly fields calls and collects articles from around the nation about the very subject that used to embarrass her."<sup>38</sup> Under a terrific headline, "Speaking Well of Lawyers," Carpenter observed, "The commission and committees serve as teachers, counselors and matchmakers. They fix up lawyers with people who need lawyers."<sup>39</sup>

This endeavor has also cemented a relationship between the practicing bar and legal services organizations stronger than has ever existed. Undoubtedly, the winners will be low-income Hoosiers who need legal assistance.

### III. REPRESENTING DEFENDANTS IN CAPITAL CASES AND OTHERWISE

The year 2000 featured the most extensive high visibility discussions about the death penalty in a generation. Governor George Ryan's decision in January to impose a moratorium on executions in Illinois<sup>40</sup> set in motion a host of national activity.

Characteristic of this activity was the announcement by a group of leading judges, academics and practitioners of the formation of the National Committee

district based on its percent poverty. These additional grants ranged from \$3059 in District 12 to \$36,708 in District 8. CALENDAR YEAR 2001 IOLTA GRANT BREAKDOWN in *Second Annual Access to Justice Conference: BUILDING A STATE JUSTICE COMMUNITY* (2001).

34. See *Indiana Pro Bono Commission*, *EQUAL ACCESS*, Aug.-Sept. 2000, at 1, 8.

35. See *IOLTA Arrives in Indiana*, *DIALOGUE*, Winter 1998, at 22; David J. Remondini & Greg McConnell, *Creating a Pro Bono Culture: An Update on Indiana's Statewide Pro Bono System*, *DIALOGUE*, Fall 2000, at 17.

36. See, e.g., *Advice on Filing New IOLTA Form*, *IND. LAW.*, Aug. 2-15, 2000, at 17; Hon. Ezra Friedlander & David J. Remondini, *Recipe for Diversity*, *JUD. DIVISION REC.*, Winter 1999, at 1; Joanne Orr, *The Foundation in the 90's: Pro Bono and IOLTA*, *RES GESTAE*, Oct. 2000, at 10; David J. Remondini, *IOLTA Arrives in Indiana: Trial Judges to Play Key Role in Pro Bono Plan*, *RES GESTAE*, Feb. 1998, at 9.

37. Dan Carpenter, *Speaking Well of Lawyer*, *INDIANAPOLIS STAR*, Sept. 15, 2000, at A17-18.

38. *Id.* at A17.

39. *Id.*

40. Ken Armstrong & Steve Mills, *Ryan Suspends Death Penalty: Illinois First State to Impose Moratorium on Executions*, *CHI. TRIB.*, Jan. 31, 2000, at C1.



to Prevent Wrongful Executions to promote improvements in the administration of the death penalty. The committee included former Florida Chief Justice Gerald Kogan.<sup>41</sup> Justice Kogan was an important recruit for the organizers. Newspaper reports identified him as having voted to uphold a penalty of death more than 200 times and having even opined that revenge might be an appropriate basis for executing "extra-heinous" criminals.<sup>42</sup> He has also voted to continue litigation in "extra-heinous" cases.<sup>43</sup>

President Clinton announced a review of the federal death penalty, apparently prompted by the likelihood of the first federal execution in many years, but noted that there had been "no suggestion, as far as I know, that any of the cases where the convictions occurred were wrongly decided."<sup>44</sup> The

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41. The foundation of the Death Penalty Initiative (formerly known as the National Committee to Prevent Wrongful Executions) of the Constitution Project is the shared belief by its members, both supporters and opponents of the death penalty, that the risk of wrongful convictions and executions is too great. The Committee plans to "develop consensus guidelines on meaningful and specific reforms, and [] carry out a program of public education about them. It will create educational materials, speak out publicly, meet with members of the media and with other opinion-leaders, and support the work of like-minded groups." Questions and Answers about the National Committee to Prevent Wrongful Executions, available at, <http://www.constitutionproject.org/dpi/questions.html> (last visited May 9, 2001).

Justice Kogan testified before the House Judiciary Committee's Crime Subcommittee on June 20, 2000. He urged the adoption of the Innocence Protection Act, H.R. 4167, which proposes reforms of death penalty laws including the establishment of a national standard for competent representation. Innocence Protection Act: Hearing on H.R. 4167 Before the House Comm. on the Judiciary, 106th Cong. (2000) (statement of Hon. Gerald Kogan, former Chief Justice of the Florida Supreme Court).

42. Howard Troxler, *Figuring "I Don't Know" into Life, Death*, ST. PETERSBURG TIMES ONLINE 1-4 (June 28, 2000), at [http://www.sptimes.com/NEWS/062800/TampaBay/Figuring\\_\\_I\\_don\\_t\\_kno.shtml](http://www.sptimes.com/NEWS/062800/TampaBay/Figuring__I_don_t_kno.shtml).

43. When the infamous Theodore Bundy was on his last trip to the Florida Supreme Court just days before he was executed, seven of the nine justices concluded that his final claims were either retreads or long-since barred. *Bundy v. State*, 538 So. 2d 445 (Fla. 1989). Justice Kogan wanted to address them on the merits. *See id.* at 448 (Barkett, J., specially concurring, joined by Kogan, J.).

44. In his press conference last year, President Clinton indicated that with regard to capital cases the issues needing attention are different at the state and federal level. The issue requiring assessment by states is the provision of "the strongest possible effort to guarantee adequate assistance of counsel." At the federal level, he said, the issue "relate[s] to the disturbing racial composition of those who have been convicted." President Clinton announced that he had a review of this issue underway. President William Jefferson Clinton, Press Conference by the President at the White House (June 28, 2000), available at <http://usinfo.state.gov> (last visited May 10, 2001).

The Department of Justice investigated the existence of racial, ethnic and geographic disparities in death penalty cases. The study also described the Department's "internal decision-making process for deciding whether to seek the death penalty in individual cases." U.S. DEP'T OF JUSTICE, *THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988-2000)*, at 1 (2000).



President also suggested that the governors whose states use the death penalty initiate similar reviews,<sup>45</sup> and Governor Frank O'Bannon asked Indiana's Criminal Law Study Commission to undertake an examination of our state's administration of its death penalty law.<sup>46</sup>

Unlike Governor Ryan, Governor O'Bannon did not impose a moratorium on executions.<sup>47</sup> The best reason for withholding such action was the existence, for nearly ten years now, of the Indiana Public Defender Commission<sup>48</sup> and Supreme Court Criminal Rule 24.<sup>49</sup> Indiana was the second state in the country to adopt rules guaranteeing that lawyers who represent those facing the death penalty have the requisite training and experience such litigation requires, receive adequate compensation to attract able practitioners, and have the time necessary to conduct an effective defense.<sup>50</sup>

Indiana has a long history of providing counsel to indigent defendants,<sup>51</sup> and our leadership on providing capable counsel to defendants in capital cases has

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The Clinton Administration declined to impose a moratorium of its own. See Mike Dorning, *Reno Won't Delay U.S. Executions, Report Details Wide Racial Disparities*, CHI. TRIB., Sept. 13, 2000.

45. See Naftali Bendavid, *Clinton Won't Follow Illinois on Executions But President Praises Ryan as 'Courageous'*, CHI. TRIB., Feb. 17, 2000, at 1. Clinton stated, "If I were governor still, I would look very closely at the situation in my state and decide what the facts were." *Id.*

46. Diana Penner, *Governor Calls for Study of State's Death Penalty*, INDIANAPOLIS STAR, Mar. 10, 2000, at A1-2. The Indiana Criminal Law Study Commission is staffed by the Indiana Criminal Justice Institute. The Commission had not yet completed its study of the application of Indiana's death penalty law at the time of Gerald W. Bivins' execution on March 14, 2001. See Dianna Penner, *O'Bannon is Unlikely to Halt Bivins' Execution*, INDIANAPOLIS STAR, Mar. 9, 2001, at C1. Bivins was convicted of murdering a minister at a rest area in 1991 and did not seek further appeal prior to his execution. See *id.*; *Bivins v. State*, 735 N.E.2d 1116 (Ind. 2000) (affirming denial of post-conviction relief); *Bivins v. State*, 642 N.E.2d 928 (Ind. 1994) (affirming convictions and sentence), *cert. denied*, 516 U.S. 1077 (1996). Commission member and Indiana Public Defender Susan Carpenter was quoted as saying, "I certainly would like to see a moratorium while we're still in the evidence-gathering, discussion stage." See Penner, *supra*, at C5. Governor O'Bannon responded, "[t]here's still no reason for a moratorium." *Id.*

47. The governor apparently possesses the authority to do so, under the pardon power of the Indiana Constitution, which says: "The Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law." IND. CONST. art. V, § 17 (amended 1984). A "reprieve" is a "temporary postponement of the execution of a criminal sentence." BLACK'S LAW DICTIONARY 1305 (7th ed. 1999).

48. IND. CODE § 33-9-13-1 (effective July 1, 1989; amendment effective May 1, 1993).

49. IND. CRIM. RULE 24 (adopted Nov. 30, 1989, effective Jan. 1, 1990; amended Feb. 4, 2000, effective Jan. 1, 2001).

50. Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and Its Implications for the Nation*, 29 IND. L. REV. 495 (1996).

51. See *Webb v. Baird*, 6 Ind. 13, 18 (1854) (holding a criminal defendant had right to attorney at public expense if unable to afford or hire one on his own).



attracted wide attention. The decisions of all three branches of Indiana government over the last decade created a model for indigent death penalty representation that just in the last year has been the subject of inquiry by legislators, commissions, and judges in Illinois, Michigan, New York, Mississippi, Texas, and a host of other places.

The adoption of Rule 24 has made a substantial change in the landscape of capital litigation. As our court noted in *Ben-Yisrayl v. State*,<sup>52</sup> these protections stand alongside the Sixth Amendment in protecting a capital defendant's rights.<sup>53</sup> We have also pointed out that the defendant is not the only one with an interest at stake: "The State has a strong interest in the proper conduct of every trial and that concern is maximized in death penalty litigation."<sup>54</sup> Where the dictates of the Rule are not followed, the odds of reversal go up.<sup>55</sup>

During the year 2000, the Indiana Supreme Court revised Rule 24 in an effort to build on this valuable foundation. First, we raised the hourly rate payable to counsel by twenty-nine percent.<sup>56</sup> We also adopted provisions designed to enable Indiana's counties to provide capital counsel through salaried attorneys, possibly a more cost-effective method in certain areas.<sup>57</sup> Finally, we permitted counsel to seek advance approval for expert expenses and provided for monthly reimbursement.<sup>58</sup>

But the quieter, and for most people, more pertinent progress that Indiana has made relates not to the dozen capital cases a year, but to the 280,000 felony and misdemeanor cases filed each year. Many of these involve people cannot afford a lawyer, and we know from experience that some of them are innocent. During the last two years, county commissioners, council members and judges in county after county have decided to upgrade the quality of representation they provide. They have done this in part because they believe it represents a respectable moral public policy. They have also done it on the representation, enacted in the Indiana Code, that the State would pay a part of the cost.<sup>59</sup>

This move to improve access to justice has never been on the top ten in the political hit parade, but it is plain that Hoosiers want the justice in their criminal courts to be meted out to those who deserve it and only to those who deserve it. This advancement has cost money, both at the local and the state level, and I thank Governor O'Bannon and a good many legislators who have worked hard

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52. 729 N.E.2d 102 (Ind. 2000).

53. *See id.* at 105-06.

54. *Lowrimore v. State*, 728 N.E.2d 860 (Ind. 2000).

55. *See Prowell v. State*, 741 N.E.2d 704 (Ind. 2001) (holding that capital attorneys not afforded adequate protection from other cases, elected to focus on upcoming non-capital case, post-conviction relief ordered).

56. The amendment increased the hourly rate in capital cases from \$70 to \$90. IND. CRIM. RULE 24(C)(1) (amended Dec. 22, 2000, effective Jan. 1, 2001).

57. IND. CRIM. RULE 24(C)(4) (amended Dec. 22, 2000, effective Jan. 1, 2001).

58. IND. CRIM. RULE 24(C)(2) (amended Dec. 22, 2000, effective Jan. 1, 2001).

59. The State reimburses counties forty percent of the cost of non-capital public defender services. IND. CODE § 33-9-14-4(b) (Supp. 2000).



to follow through on this commitment.

It will keep Indiana out of the headlines that have plagued so many other states and instead mark us a place that works hard at doing justice for all.<sup>60</sup>

#### CONCLUSION

On each of these fronts, the Indiana legal profession has acquitted itself well in reforming the legal system to benefit Indiana's six million people. It is an honor to serve such a legal community as Chief Justice.

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60. The *New York Times* recently reported, "[I]n New York City, there is some basic legal work an indigent defendant cannot expect." Jane Fritsch & David Rohde, *Legal Help Often Fails New York's Poor*, N.Y. TIMES, Apr. 8, 2001, at 1. For example, Juan Carlos Pichardo was convicted of murdering a drug dealer in 1994 and sentenced to twenty years to life. *Id.* at 27. The prosecutor's key witness was the victim's wife, who testified that she saw Pichardo shoot her husband. *Id.* Pichardo's appellate attorney discovered that his trial attorney failed to contact two witnesses whose police statements contradicted the victim's wife's testimony. The trial attorney also failed to uncover a police report in which the victim's wife stated that she had not seen who killed her husband. After finding that the trial attorney displayed a "regrettable ignorance of basic principles of criminal law," the appeals court granted Pichardo a retrial, which resulted in an acquittal. *Id.*



# AN EXAMINATION OF THE INDIANA SUPREME COURT DOCKET, DISPOSITIONS, AND VOTING IN 2000\*

KEVIN W. BETZ\*\*  
P. JASON STEPHENSON\*\*\*

In 2000, the Indiana Supreme Court substantially increased its productivity. The court issued the second most opinions in 2000 in the previous 10 years of this study.<sup>1</sup> Despite the increase in productivity, the court continued to be overwhelmed with mandatory criminal appeals. The court issued the lowest percentage of civil opinions in the 10 years of this study.

Leading the charge for the court's increased productivity was Chief Justice Shepard who authored the greatest number of opinions and twice as many civil opinions as any of the other justices. The Chief Justice also demonstrated his leadership by having the distinction of the justice most aligned with the other justices and being in the majority in 13 of 15 split decisions.

Although the court's productivity is up, the constitutional change in its

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\* The Tables presented in this Article are patterned after the annual statistics of the U.S. Supreme Court published in the *Harvard Law Review*. An explanation of the origin of these Tables can be found at Louis Henkin, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 301 (1968). The *Harvard Law Review* granted permission for the use of these Tables by the *Indiana Law Review* this year; however, permission for any further reproduction of these Tables must be obtained from the *Harvard Law Review*.

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1.

|      | MANDATORY | DISCRETIONARY | TOTAL |
|------|-----------|---------------|-------|
| 1991 | 109 (53%) | 98 (47%)      | 207   |
| 1992 | 64 (41%)  | 93 (59%)      | 157   |
| 1993 | 60 (44%)  | 77 (56%)      | 137   |
| 1994 | 60 (45%)  | 73 (55%)      | 133   |
| 1995 | 46 (38%)  | 76 (62%)      | 122   |
| 1996 | 68 (59%)  | 48 (41%)      | 116   |
| 1997 | 100 (58%) | 71 (42%)      | 171   |
| 1998 | 84 (63%)  | 50 (37%)      | 134   |
| 1999 | 101(59%)  | 69 (41%)      | 170   |
| 2000 | 132 (69%) | 60 (31%)      | 192   |



mandatory jurisdiction will still be welcome. Of 137 mandatory criminal appeals, over 83% were affirmed suggesting that the vast majority of the mandatory criminal appeals did not warrant review by the court of last resort.<sup>2</sup> Evidence of the anticipated impact of the constitutional change in the court's jurisdiction may be seen in the drastic increase in the number of civil petitions to transfer the court granted. This suggests the court's docket will develop a more even balance of criminal and civil cases. The full brunt of this change will not occur until June 2001 when appeals initiated by the filing of a Notice of Appeal will become subject to the change in the court's jurisdiction. This change will not only open the court to "people with ordinary family and business legal problems" but also permit the court to take a more significant role in providing more law-giving criminal opinions.<sup>3</sup>

The following is a description of the highlights from each table.

**Table A.** In 2000, the supreme court issued 192 opinions that were authored by an individual justice. This is an increase from last year's 170 opinions authored by an individual justice. Of the 192 issued in 2000, only 49 were civil opinions and 143 were criminal.

The court as a whole issued 71 per curiam opinions—70 civil and one criminal. Almost all of the 70 civil opinions were attorney discipline matters.

In a change from the previous three years, Chief Justice Shepard authored the greatest number of opinions, 52. The Chief Justice authored double the number of civil opinions of any other justice. Justice Boehm authored nearly as many total opinions with 48.

The court continued to increase its number of dissents. In 1999 the court issued 38 dissents as compared to 42 in 2000. Justice Sullivan, as in the past, had the most total dissents with 13. Justice Dickson, also as in the past, was next with 12.

**Table B-1.** For civil cases, Chief Justice Shepard and Justice Rucker were the two justices most aligned at 89.8%. Chief Justice Shepard and Justice Sullivan were next at 85.7%. Justices Dickson and Sullivan were the least aligned at 68.3%. Justice Rucker was the most aligned with other justices, and Justice Dickson was the least aligned.

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2. The court fought this battle against an overwhelming number of mandatory criminal cases in 1988. The court is fighting the battle again. See Kevin W. Betz & Andrew T. Deibert, *An Examination of the Indiana Supreme Court Docket, Dispositions, and Voting in 1996*, 30 IND. L. REV. 933 (1997); see also Randall T. Shepard, *Changing the Constitutional Jurisdiction of the Indiana Supreme Court: Letting a Court of Last Resort Act Like One*, 63 IND. L.J. 669 (1988); Randall T. Shepard, *Foreword: Indiana Law, the Supreme Court, and a New Decade*, 24 IND. L. REV. 499 (1991).

3. Randall T. Shepard, *Why Changing the Supreme Court's Mandatory Jurisdiction Is Critical to Lawyers and Clients*, 33 IND. L. REV. 1101, 1104 (2000).



**Table B-2.** For criminal cases, Chief Justice Shepard and Justice Boehm, along with Chief Justice Shepard and Justice Rucker, are the most aligned pair of justices—each in agreement 95.8% of the time. Justices Sullivan and Dickson were the least aligned at 87.5%. As for criminal cases, Chief Justice Shepard was the most aligned with his fellow justices.

**Table B-3.** For all cases, Chief Justice Shepard and Justice Rucker were the two justices most aligned, at 94.5%. The two least aligned justices, also the same as last year, were Justices Sullivan and Dickson at 83.2%. Overall, Chief Justice Shepard was the most aligned with his fellow justices.

**Table C.** The court's unanimity remained virtually identical for 1999 and 2000. The court was either unanimous or unanimous with concurrence in 87% of its opinions in both 1999 and 2000. This suggests that the presence of a new justice has had little impact upon the unanimity of the court.

**Table D.** The number of 3-2 split decisions continued to increase in 2000. The court split on fifteen decisions in 2000, as compared to nine in its 1999 term. Chief Justice Shepard was in the majority the most often, having been in the majority in 13 of the 15 split decisions.

**Table E-1.** The court affirmed over 83% of the mandatory criminal appeals, which was also the majority of its docket. This is a compelling argument for why the court's jurisdiction needed to be changed. Obviously, with a change in jurisdiction, the court would not even have transferred the vast majority of these appeals. For comparisons sake, the court affirmed only 26.8% of the civil appeals and 58.3% of the nonmandatory criminal appeals. Now that the constitutional amendment has fully passed, the court's docket of mandatory criminal appeals should significantly dwindle in June 2001 when the court implements the amendment, and diminish completely in 2002.

**Table E-2.** The court drastically increased the number of civil petitions it transferred, from 35 in 1999 to 61 in 2000, and the number of criminal petitions granted, from 22 in 1999 to 41 in 2000. This may, in part, reflect the court's anticipation of eliminating many mandatory criminal appeals because of the new constitutional amendment.

A civil petition to transfer stood about a 17% chance of being granted, and a criminal petition stood about a 9% chance of being granted. Juvenile petitions face the least chance of being granted at 5.4%.

**Table F.** The court continues its interest in the Indiana Constitution with 28 opinions involving such issues. The number of attorney discipline cases reviewed, of which there were only 36 last year, returned to past ranges this year at 60.



**TABLE A**  
**OPINIONS<sup>a</sup>**

|                           | OPINIONS OF COURT <sup>b</sup> |            |            | CONCURRENCES <sup>c</sup> |          |           | DISSENTS <sup>d</sup> |           |           |
|---------------------------|--------------------------------|------------|------------|---------------------------|----------|-----------|-----------------------|-----------|-----------|
|                           | Criminal                       | Civil      | Total      | Criminal                  | Civil    | Total     | Criminal              | Civil     | Total     |
| Shepard, C.J.             | 28                             | 24         | 52         | 1                         | 0        | 1         | 1                     | 2         | 3         |
| Dickson, J. <sup>e</sup>  | 34                             | 2          | 36         | 3                         | 3        | 6         | 3                     | 9         | 12        |
| Sullivan, J. <sup>e</sup> | 25                             | 8          | 33         | 6                         | 2        | 8         | 7                     | 6         | 13        |
| Boehm, J. <sup>e</sup>    | 36                             | 12         | 48         | 3                         | 3        | 6         | 3                     | 4         | 7         |
| Rucker, J. <sup>e</sup>   | 20                             | 3          | 23         | 2                         | 0        | 2         | 3                     | 4         | 7         |
| Per Curiam                | 1                              | 70         | 71         |                           |          |           |                       |           |           |
| <b>Total</b>              | <b>144</b>                     | <b>119</b> | <b>263</b> | <b>15</b>                 | <b>8</b> | <b>23</b> | <b>17</b>             | <b>24</b> | <b>42</b> |

<sup>a</sup> These are opinions and votes on opinions by each justice and in per curiam in the 2000 term. The Indiana Supreme Court is unique because it is the only supreme court to assign each case to a justice by a consensus method. Cases are distributed by a consensus of the justices in the majority on each case either by volunteering or nominating writers. The chief justice does not have any power to control the assignments other than as a member of the majority. See Melinda Gann Hall, *Opinion Assignment Procedures and Conference Practices in State Supreme Courts*, 73 JUDICATURE 209, 210 (1990). The order of discussion and voting is started by the most junior member of the court and follows reverse seniority. See *id.*

<sup>b</sup> This is only a counting of full opinions written by each justice. Plurality opinions that announce the judgment of the court are counted as opinions of the court. It includes opinions on civil, criminal, and original actions. Also, the following three miscellaneous cases are not included in the table: *Ind. Lawrence Bank v. PSB Credit Serv., Inc.*, 724 N.E.2d 1091 (Ind. 2000) (dissent from denial of transfer); *Davenport v. State*, 696 N.E.2d 870 (Ind. 1998) (denial of petition to reinstate convictions); *Lenhardt Tool & Die Co. v. Lumpe*, 722 N.E.2d 824 (Ind. 2000) (interlocutory appeal of denial of summary judgement).

<sup>c</sup> This category includes both written concurrences, joining in written concurrence, and votes to concur in result only.

<sup>d</sup> This category includes both written dissents and votes to dissent without opinion. Opinions concurring in part and dissenting in part or opinions concurring in part only and differing on another issue are counted as dissents.

<sup>e</sup> Justices declined to participate in the following non-disciplinary cases: Justice Sullivan: *H.B. v. Elkhart County Div. of Family and Children*, 735 N.E.2d 222 (Ind. 2000); Justice Boehm: *Anthem Ins. Co. v. Tenet Healthcare Corp.*, 730 N.E.2d 1227 (Ind. 2000); *Ind. Univ. Med. Cen. v. Logan*, 728 N.E.2d 855 (Ind. 2000); Justice Dickson: *Celebration Fireworks, Inc. v. Smith*, 727 N.E.2d 450 (Ind. 2000); Justice Rucker: *Coleman v. State*, 741 N.E.2d 697 (Ind. 2000); *Troxel v. Troxel*, 737 N.E.2d 745 (Ind. 2000); *United States Gypsum, Inc. v. Ind. Gas Co., Inc.*, 735 N.E.2d 790 (Ind. 2000); *Dimitroff v. Dimitroff*, 735 N.E.2d 238 (Ind. 2000); *In re N.B.*, 735 N.E.2d 238 (Ind. 2000); *Plesha v. Edmonds*, 735 N.E.2d 235 (Ind. 2000); *In re Malone*, 735 N.E.2d 234 (Ind. 2000); *Snyder v. Ind. Dep't of Revenue*, 735 N.E.2d 233 (Ind. 2000); *Huddleston v. Div. of Family and Children*, 735 N.E.2d 233 (Ind. 2000); *Perry-Worth Concerned Citizens v. Bd. of Comm'rs of Boone County*, 735 N.E.2d 231 (Ind. 2000); *Smith v. Tippecanoe County Office of Family and Children*, 735 N.E.2d 231 (Ind. 2000); *Everett v. State*, 735 N.E.2d 229 (Ind. 2000); *Columbia Club v. American Fletcher Realty Corp.*, 735 N.E.2d 229 (Ind. 2000); *Gomolisky v. Davis*, 735 N.E.2d 228 (Ind. 2000); *St. Margaret Mercy Healthcare Ctrs. v. Lake County*, 735 N.E.2d 227 (Ind. 2000); *Foster v. Evergreen Healthcare, Inc.*, 735 N.E.2d 223 (Ind. 2000); *Hutchinson v. Old Ind. Ltd. Liab. Co.*, 735 N.E.2d 223 (Ind. 2000); *Guthrie v. State*, 735 N.E.2d 220 (Ind. 2000); *Bagnall v. Town of Beverly Shores*, 726 N.E.2d 782 (Ind. 2000).



TABLE B-1  
VOTING ALIGNMENTS FOR CIVIL CASES<sup>f</sup>  
NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES

|                  |   | Shepard | Dickson | Sullivan | Boehm | Rucker |
|------------------|---|---------|---------|----------|-------|--------|
| Shepard,<br>C.J. | O |         | 31      | 35       | 35    | 35     |
|                  | S |         | 0       | 1        | 0     | 0      |
|                  | D | ---     | 31      | 36       | 35    | 35     |
|                  | N |         | 41      | 42       | 41    | 39     |
|                  | P |         | 75.6%   | 85.7%    | 85.4% | 89.8%  |
| Dickson,<br>J.   | O | 31      |         | 28       | 31    | 29     |
|                  | S | 0       |         | 0        | 2     | 1      |
|                  | D | 31      | ---     | 28       | 33    | 30     |
|                  | N | 41      |         | 41       | 40    | 38     |
|                  | P | 75.6%   |         | 68.3%    | 82.5% | 78.9%  |
| Sullivan,<br>J.  | O | 35      | 28      |          | 32    | 32     |
|                  | S | 1       | 0       |          | 1     | 1      |
|                  | D | 36      | 28      | ---      | 33    | 33     |
|                  | N | 42      | 41      |          | 41    | 39     |
|                  | P | 85.7%   | 68.3%   |          | 80.5% | 84.6%  |
| Boehm,<br>J.     | O | 35      | 31      | 32       |       | 32     |
|                  | S | 0       | 2       | 1        |       | 0      |
|                  | D | 35      | 33      | 33       | ---   | 32     |
|                  | N | 41      | 40      | 41       |       | 38     |
|                  | P | 85.4%   | 82.5%   | 80.5%    |       | 84.2%  |
| Rucker,<br>J.    | O | 35      | 29      | 32       | 32    |        |
|                  | S | 0       | 1       | 1        | 0     |        |
|                  | D | 35      | 30      | 33       | 32    | ---    |
|                  | N | 39      | 38      | 39       | 38    |        |
|                  | P | 89.8%   | 78.9%   | 84.6%    | 84.2% |        |

<sup>f</sup> This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only civil cases. For example, in the top set of numbers for Chief Justice Shepard, 31 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a civil case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

- “O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.
- “S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.
- “D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.
- “N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.
- “P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”



**TABLE B-2**  
**VOTING ALIGNMENTS FOR CRIMINAL CASES**  
**NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES<sup>8</sup>**

|                  |   | Shepard | Dickson | Sullivan | Boehm | Rucker |
|------------------|---|---------|---------|----------|-------|--------|
| Shepard,<br>C.J. | O |         | 136     | 131      | 138   | 138    |
|                  | S |         | 0       | 0        | 0     | 0      |
|                  | D | —       | 136     | 131      | 138   | 138    |
|                  | N |         | 144     | 144      | 144   | 144    |
|                  | P |         | 94.4%   | 91.0%    | 95.8% | 95.8%  |
| Dickson,<br>J.   | O | 136     |         | 125      | 132   | 132    |
|                  | S | 0       |         | 1        | 2     | 0      |
|                  | D | 136     | ---     | 126      | 134   | 132    |
|                  | N | 144     |         | 144      | 144   | 144    |
|                  | P | 94.4%   |         | 87.5%    | 93.1% | 91.7%  |
| Sullivan,<br>J.  | O | 131     | 125     |          | 127   | 129    |
|                  | S | 0       | 1       |          | 0     | 2      |
|                  | D | 131     | 126     | ---      | 127   | 131    |
|                  | N | 144     | 144     |          | 144   | 144    |
|                  | P | 91.0%   | 87.5%   |          | 88.2% | 90.9%  |
| Boehm,<br>J.     | O | 138     | 132     | 127      |       | 134    |
|                  | S | 0       | 2       | 0        |       | 1      |
|                  | D | 138     | 134     | 127      | —     | 135    |
|                  | N | 144     | 144     | 144      |       | 144    |
|                  | P | 95.8%   | 93.1%   | 88.2%    |       | 93.8%  |
| Rucker,<br>J.    | O | 138     | 132     | 129      | 134   |        |
|                  | S | 0       | 0       | 2        | 1     |        |
|                  | D | 138     | 132     | 131      | 135   | ---    |
|                  | N | 144     | 144     | 144      | 144   |        |
|                  | P | 95.8%   | 91.7%   | 90.9%    | 93.8% |        |

<sup>8</sup> This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only criminal cases. For example, in the top set of numbers for Chief Justice Shepard, 136 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a criminal case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

- “O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.
- “S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.
- “D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.
- “N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.
- “P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”



**TABLE B-3**  
**VOTING ALIGNMENTS FOR ALL CASES**  
**NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES<sup>h</sup>**

|                  |   | Shepard | Dickson | Sullivan | Boehm  | Rucker |
|------------------|---|---------|---------|----------|--------|--------|
| Shepard,<br>C.J. | O |         | 167     | 166      | 173    | 173    |
|                  | S |         | 0       | 1        | 0      | 0      |
|                  | D | ---     | 167     | 167      | 173    | 173    |
|                  | N |         | 185     | 186      | 185    | 183    |
|                  | P |         | 90.3%   | 89.8%    | 93.5 % | 94.5 % |
| Dickson,<br>J.   | O | 167     |         | 153      | 163    | 161    |
|                  | S | 0       |         | 1        | 4      | 1      |
|                  | D | 167     | ---     | 154      | 167    | 162    |
|                  | N | 185     |         | 185      | 184    | 182    |
|                  | P | 90.3%   |         | 83.2%    | 90.8 % | 89.0 % |
| Sullivan,<br>J.  | O | 166     | 153     |          | 159    | 161    |
|                  | S | 1       | 1       |          | 1      | 3      |
|                  | D | 167     | 154     | ---      | 160    | 164    |
|                  | N | 186     | 185     |          | 185    | 183    |
|                  | P | 89.8%   | 83.2%   |          | 86.5 % | 89.6 % |
| Boehm,<br>J.     | O | 173     | 163     | 159      |        | 166    |
|                  | S | 0       | 4       | 1        |        | 1      |
|                  | D | 173     | 167     | 160      | ---    | 167    |
|                  | N | 185     | 184     | 185      |        | 182    |
|                  | P | 93.5%   | 90.8%   | 86.5%    |        | 91.8 % |
| Rucker,<br>J.    | O | 173     | 161     | 161      | 166    |        |
|                  | S | 0       | 1       | 3        | 1      |        |
|                  | D | 173     | 162     | 164      | 167    | --     |
|                  | N | 183     | 182     | 183      | 182    |        |
|                  | P | 94.5%   | 89.0%   | 89.6 %   | 91.8%  |        |

<sup>h</sup> This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for all cases. For example, in the top set of numbers for Chief Justice Shepard, 167 is the total number of times Chief Justice Shepard and Justice Dickson agreed in all full majority opinions written by the court in 2000. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

- “O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.
- “S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.
- “D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.
- “N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.
- “P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”



TABLE C

UNANIMITY  
NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES<sup>i</sup>

| Unanimous <sup>j</sup> |       |             | Unanimous<br>With Concurrence <sup>k</sup> |       |           | Opinions<br>With Dissent |       |            | Total |
|------------------------|-------|-------------|--|-------|-----------|--------------------------|-------|------------|-------|
| Criminal               | Civil | Total       | Criminal                                   | Civil | Total     | Criminal                 | Civil | Total      |       |
| 121                    | 96    | 217 (81.3%) | 12   | 5     | 17 (6.4%) | 13                       | 20    | 33 (12.4%) | 267   |

<sup>i</sup> This Table tracks the number and percent of unanimous opinions among all opinions written. If, for example, only four justices participate and all concur, it is still considered unanimous. It also tracks the percent of overall opinions with concurrence and overall opinions with dissent.

<sup>j</sup> A decision is considered unanimous only when all justices participating in the case voted to concur in the court's opinion as well as its judgment. When one or more justices concurred in the result but not in the opinion, the case is not considered unanimous.

<sup>k</sup> A decision is listed in this column if one or more justices concurred in the result but not in the opinion of the court or wrote a concurrence, and there were no dissents.



TABLE D

3-2 DECISIONS<sup>1</sup>

| Justices Constituting the Majority          | Number of Opinions <sup>m</sup> |
|---|---------------------------------|
| 1. Shepard, C.J., Dickson, J., Boehm, J.    | 3                               |
| 2. Shepard, C.J., Boehm, J., Rucker, J.     | 2                               |
| 3. Shepard, C.J., Dickson, J., Sullivan, J. | 2                               |
| 4. Shepard, C.J., Sullivan, J., Boehm, J.   | 1                               |
| 5. Shepard, C.J., Sullivan, J., Rucker, J.  | 4                               |
| 6. Shepard, C.J., Dickson, J., Rucker, J.   | 1                               |
| 7. Dickson, J., Boehm, J., Rucker, J.       | 1                               |
| 8. Boehm, J., Sullivan, J., Rucker, J.      | 1                               |
| Total <sup>n</sup>                          | 15                              |

<sup>1</sup> This Table concerns only decisions rendered by full opinion. An opinion is counted as a 3-2 decision if two justices voted to decide the case in a manner different from that of the majority of the court.

<sup>m</sup> This column lists the number of times each three-justice group constituted the majority in a 3-2 decision.

<sup>n</sup> The 2000 term's 3-2 decisions were:

1. Shepard, C.J., Dickson, J., Boehm, J.: *Boggs v. Tri-State Radiology, Inc.*, 730 N.E.2d 692 (Ind. 2000) (Boehm, J.); *Dunlop v. State*, 724 N.E.2d 592 (Ind. 2000) (Dickson, J.); *Bacher v. State*, 722 N.E.2d 799 (Ind. 2000) (Dickson, J.).
2. Shepard, C.J., Boehm, J., Rucker, J.: *Bader v. Johnson*, 732 N.E.2d 1212 (Ind. 2000) (Rucker, J.); *Baxter v. State*, 727 N.E.2d 429 (Ind. 2000) (Boehm, J.).
3. Shepard, C.J., Dickson, J., Sullivan, J.: *Azania v. State*, 738 N.E.2d 248 (Ind. 2000) (Shepard, C.J.); *In re Bradburn*, 739 N.E.2d 1074 (Ind. 2000) (Shepard, C.J.).
4. Shepard, C.J., Sullivan, J., Boehm, J.: *McIntosh v. Melroe Co.*, 729 N.E.2d 972 (Ind. 2000) (Boehm, J.).
5. Shepard, C.J., Sullivan, J., Rucker, J.: *Oman v. State*, 737 N.E.2d 1131 (Ind. 2000); *Ellis v. State*, 736 N.E.2d 731 (Ind. 2000) (Shepard, C.J.); *City of Gary v. Ind. Bell Tel. Co.*, 732 N.E.2d 149 (Ind. 2000) (Sullivan, J.); *Midwest Security Life Ins. Co. v. Stroup*, 730 N.E.2d 163 (Ind. 2000) (Shepard, C.J.).
6. Shepard, C.J., Dickson, J., Rucker, J.: *Ind. Dep't of State Revenue v. Farm Credit Serv. of Mid-Am.*, 734 N.E.2d 551 (Ind. 2000) (Shepard, C.J.).
7. Dickson, J., Boehm, J., Rucker, J.: *Cavinder Elevators, Inc. v. Hall*, 726 N.E.2d 285 (Ind. 2000) (Dickson, J.).
8. Boehm, J., Sullivan, J., Rucker, J.: *In re Miller*, 730 N.E.2d 171 (Ind. 2000) (per curiam).

**TABLE E-1**  
**DISPOSITION OF CASES REVIEWED BY TRANSFER**  
**AND DIRECT APPEALS<sup>o</sup>**

|  | Reversed or Vacated <sup>p</sup> | Affirmed    | Total            |
|--|----------------------------------|-------------|------------------|
| Civil Appeals Accepted for Transfer    | 32 (73.2%)                       | 11 (26.8%)  | 43               |
| Direct Civil Appeals                   | 0                                | 0           | 0                |
| Criminal Appeals Accepted for Transfer | 5 (41.7%)                        | 7 (58.3%)   | 12               |
| Direct Criminal Appeals                | 23 (16.8%)                       | 114 (83.2%) | 137              |
| Total                                  | 60 (31.3%)                       | 132 (68.8%) | 192 <sup>q</sup> |

<sup>o</sup> Direct criminal appeals are cases in which the trial court imposed a sentence of greater than 50 years or a sentence of death. *See* IND. CONST. art. VII, § 4 (amended 2000). Thus, direct criminal appeals are those directly from the trial court. A civil appeal may also be direct from the trial court pursuant to Indiana appellate rule 4(A) and the Rules of Procedure for Original Actions. All other Indiana Supreme Court opinions are accepted for transfer from the Indiana Court of Appeals. *See* IND. APPELLATE RULE 11(B).

<sup>p</sup> Generally, the term “vacate” is used by the Indiana Supreme Court when it is reviewing a court of appeals opinion, and the term “reverse” is used when the court overrules a trial court decision. A point to consider in reviewing this Table is that the court technically “vacates” every court of appeals opinion that is accepted for transfer, but may only disagree with a small portion of the reasoning and still agree with the result. *See* IND. APP. R. 58(A). As a practical matter, “reverse” or “vacate” simply represents any action by the court that does not affirm the trial court or court of appeals opinion.

<sup>q</sup> This total does not include seventy-nine attorney and judicial discipline opinions; two writs of mandamus or prohibition; or two opinions related to certified questions. These opinions did not reverse, vacate, or affirm any other court’s decision. This total also does not include six opinions which considered petitions for post-conviction relief.



TABLE E-2

DISPOSITION OF PETITIONS TO TRANSFER  
TO SUPREME COURT IN 2000<sup>r</sup>

|                       | Denied or Dismissed | Granted     | Total |
|-----------------------|---------------------|-------------|-------|
| Petitions to Transfer |                     |             |       |
| Civil <sup>s</sup>    | 285 (82.4%)         | 61 (17.6%)  | 346   |
| Criminal <sup>t</sup> | 402 (90.6%)         | 40 (9.1%)   | 442   |
| Juvenile              | 35 (94.6%)          | 2 (5.4%)    | 37    |
| Total                 | 722 (87.5%)         | 103 (12.5%) | 825   |

<sup>r</sup> This Table analyzes the disposition of petitions to transfer by the court. See IND. APP. R. 58(A).  
<sup>s</sup> This also includes petitions to transfer in tax cases and worker's compensation cases.  
<sup>t</sup> This also includes petitions to transfer in post-conviction relief cases.

**TABLE F**  
**SUBJECT AREAS OF SELECTED DISPOSITIONS**  
**WITH FULL OPINIONS<sup>u</sup>**

| Original Actions  | Number           |
|---|------------------|
| • Certified Questions   | 2 <sup>v</sup>   |
| • Writs of Mandamus or Prohibition                                    | 2 <sup>w</sup>   |
| • Attorney and Judicial Discipline                                    | 60 <sup>x</sup>  |
| • Judicial Discipline   | 0                |
| <b>Criminal</b>   |                  |
| • Death Penalty   | 8 <sup>y</sup>   |
| • Fourth Amendment or Search and Seizure                              | 5 <sup>z</sup>   |
| • Writ of Habeas Corpus   | 0                |
| Emergency Appeals to the Supreme Court                                | 0                |
| Trusts, Estates, or Probate   | 1 <sup>aa</sup>  |
| Real Estate or Real Property  | 4 <sup>bb</sup>  |
| Personal Property   | 0                |
| Landlord-Tenant   | 0                |
| Divorce or Child Support  | 0                |
| Children in Need of Services (CHINS)                                  | 0                |
| Paternity   | 0                |
| Product Liability or Strict Liability                                 | 1 <sup>cc</sup>  |
| Negligence or Personal Injury   | 5 <sup>dd</sup>  |
| Invasion of Privacy   | 0                |
| Medical Malpractice   | 5 <sup>ee</sup>  |
| Indiana Tort Claims Act   | 3 <sup>ff</sup>  |
| Statute of Limitations or Statute of Repose                           | 0                |
| Tax, Department of State Revenue, or State Board of Tax Commissioners | 3 <sup>gg</sup>  |
| Contracts   | 2 <sup>hh</sup>  |
| Corporate Law or the Indiana Business Corporation Law                 | 0                |
| Uniform Commercial Code   | 0                |
| Banking Law   | 1 <sup>ii</sup>  |
| Employment Law  | 1 <sup>jj</sup>  |
| Insurance Law   | 1 <sup>kk</sup>  |
| Environmental Law   | 0                |
| Consumer Law  | 0                |
| Workers Compensation  | 2 <sup>ll</sup>  |
| Arbitration   | 1 <sup>mm</sup>  |
| Administrative Law  | 4 <sup>nn</sup>  |
| First Amendment, Open Door Law, or Public Records Law                 | 0                |
| Full Faith and Credit   | 0                |
| Eleventh Amendment  | 0                |
| Civil Rights  | 1 <sup>oo</sup>  |
| Indiana Constitution  | 28 <sup>pp</sup> |

<sup>u</sup> This Table is designed to provide a general idea of the specific subject areas upon which the court ruled or discussed and how many times it did so in 2000. It is also a quick-reference guide to court rulings for



practitioners in specific areas of the law. The numbers corresponding to the areas of law reflect the number of cases in which the court substantively discussed legal issues about these subject areas. Also, the following nineteen miscellaneous attorney discipline cases are not in the table: *In re Bradburn*, 739 N.E.2d 1074 (Ind. 2000) (order finding misconduct and imposing discipline); *In re Bowyer*, 739 N.E.2d 1074 (Ind. 2000) (order suspending respondent due to disability); *In re Wagner*, 745 N.E.2d 192 (Ind. 2000); *In re DeMato*, 736 N.E.2d 1243 (Ind. 2000) (order postponing effective date of suspension); *In re Jones*, 737 N.E.2d 1158 (Ind. 2000) (order imposing discipline upon agreed facts); *In re Kummerer*, 738 N.E.2d 1044 (Ind. 2000) (order releasing respondent from probation); *In re Coburn*, 734 N.E.2d 582 (Ind. 2000) (order accepting resignation and concluding proceeding); *In re Fernandes*, 737 N.E.2d 1149 (Ind. 2000) (order of suspension upon notice of guilty finding); *In re Jones*, 736 N.E.2d 264 (Ind. 2000) (order revoking probationary licence to practice law); *In re Welling*, 736 N.E.2d 1198 (Ind. 2000) (order granting respondent's motion to vacate hearing and accepting respondent's admission of violation of probation and consent to discipline); *In re Crawford*, 734 N.E.2d 563 (Ind. 2000) (order accepting resignation and concluding proceeding); *In re Rorrer*, 734 N.E.2d 581 (Ind. 2000) (order of suspension pending notice of guilty finding); *In re Speicher*, 734 N.E.2d 533 (Ind. 2000) (order suspending the respondent due to disability and dismissing verified complaint without prejudice); *In re Stasek*, 728 N.E.2d 851 (Ind. 2000) (order accepting resignation and concluding proceeding); *In re Hayden*, 728 N.E.2d 139 (Ind. 2000) (order accepting resignation and concluding proceeding); *In re Myers*, 727 N.E.2d 1083 (Ind. 2000) (order accepting resignation and concluding proceeding); *In re Frey*, 729 N.E.2d 143 (Ind. 2000) (order accepting resignation and concluding proceeding); *In re Kelly*, 724 N.E.2d 600 (Ind. 2000) (order granting reinstatement); and *In re Cheslek*, 723 N.E.2d 863 (Ind. 2000) (order of suspension upon notice of conviction).

<sup>v</sup> *Sowers v. State*, 724 N.E.2d 588 (Ind. 2000); *Livingston v. Fast Cash USA, Inc.*, 737 N.E.2d 1155 (Ind. 2000).

<sup>w</sup> *State ex rel Jones v. Knox Superior Court No. 1*, 728 N.E.2d 133 (Ind. 2000); *State ex rel. Koppe v. Cass Circuit Court*, 723 N.E.2d 866 (Ind. 2000).

<sup>x</sup> *In re Huelskamp*, 740 N.E.2d 846 (Ind. 2000); *In re Smith*, 740 N.E.2d 849 (Ind. 2000); *In re Martenet*, 694 N.E.2d 1143 (Ind. 2000); *In re Glasser*, 739 N.E.2d 660 (Ind. 2000); *In re Scott*, 739 N.E.2d 658 (Ind. 2000); *In re Quinn*, 738 N.E.2d 678 (Ind. 2000); *In re Adams*, 738 N.E.2d 276 (Ind. 2000); *In re Fleck*, 738 N.E.2d 277 (Ind. 2000); *In re Gaydos*, 738 N.E.2d 276 (Ind. 2000); *In re Hartman*, 738 N.E.2d 277 (Ind. 2000); *In re Cole*, 738 N.E.2d 1035 (Ind. 2000); *In re Bamberth*, 737 N.E.2d 1157 (Ind. 2000); *In re Kehoe*, 737 N.E.2d 1156 (Ind. 2000); *In re Toth*, 737 N.E.2d 1157 (Ind. 2000); *In re Atanga*, 736 N.E.2d 1244 (Ind. 2000); *In re Lewis*, 736 N.E.2d 226 (Ind. 2000); *In re Cable*, 736 N.E.2d 226 (Ind. 2000); *In re Crenshaw*, 736 N.E.2d 263 (Ind. 2000); *In re Alpert*, 735 N.E.2d 1173 (Ind. 2000); *In re Anderson*, 735 N.E.2d 1177 (Ind. 2000); *In re Balogh*, 735 N.E.2d 1174 (Ind. 2000); *In re Bridenhager*, 735 N.E.2d 1177 (Ind. 2000); *In re Goebel*, 735 N.E.2d 1178 (Ind. 2000); *In re Hobbs*, 735 N.E.2d 1175 (Ind. 2000); *In re Kinnaird*, 735 N.E.2d 1176 (Ind. 2000); *In re Smith*, 735 N.E.2d 1176 (Ind. 2000); *In re Kouros*, 735 N.E.2d 202 (Ind. 2000); *In re Braun*, 734 N.E.2d 535 (Ind. 2000); *In re James*, 734 N.E.2d 534 (Ind. 2000); *In re Anonymous*, 734 N.E.2d 583 (Ind. 2000); *In re Poole*, 733 N.E.2d 467 (Ind. 2000); *In re Cartmel*, 733 N.E.2d 467 (Ind. 2000); *In re Condos*, 733 N.E.2d 466 (Ind. 2000); *In re Jackson*, 733 N.E.2d 468 (Ind. 2000); *In re Ricci*, 733 N.E.2d 466 (Ind. 2000); *In re Thonert*, 733 N.E.2d 932 (Ind. 2000); *In re Watson*, 733 N.E.2d 934 (Ind. 2000); *In re Wilber*, 729 N.E.2d 589 (Ind. 2000); *In re McLin*, 729 N.E.2d 1007 (Ind. 2000); *In re Woods*, 729 N.E.2d 1008 (Ind. 2000); *In re Miller*, 730 N.E.2d 171 (Ind. 2000); *In re Anonymous*, 729 N.E.2d 566 (Ind. 2000); *In re Galloway*, 729 N.E.2d 574 (Ind. 2000); *In re Oliver*, 729 N.E.2d 582 (Ind. 2000); *In re Ault*, 728 N.E.2d 869 (Ind. 2000); *In re McFadden*, 729 N.E.2d 137 (Ind. 2000); *In re Edmiston*, 727 N.E.2d 97 (Ind. 2000); *In re McCarty*, 729 N.E.2d 98 (Ind. 2000); *In re Jones*, 727 N.E.2d 711 (Ind. 2000); *In re Roberts*, 727 N.E.2d 705 (Ind. 2000); *In re Bass*, 726 N.E.2d 1259 (Ind. 2000); *In re Levy*, 726 N.E.2d 1257



(Ind. 2000); *In re Anonymous*, 724 N.E.2d 1101 (Ind. 2000); *In re Wamsley*, 725 N.E.2d 75 (Ind. 2000); *In re Hagedorn*, 725 N.E.2d 397 (Ind. 2000); *In re Humphrey*, 725 N.E.2d 70 (Ind. 2000); *In re Warrum*, 724 N.E.2d 1097 (Ind. 2000); *In re Mears*, 723 N.E.2d 873 (Ind. 2000); *In re Holmes*, 722 N.E.2d 818 (Ind. 2000); *In re McCord*, 722 N.E.2d 820 (Ind. 2000).

<sup>r</sup> *Corcoran v. State*, 739 N.E.2d 649 (Ind. 2000) (reversing); *Azania v. State*, 738 N.E.2d 248 (Ind. 2000) (reversing); *Bivins v. State*, 735 N.E.2d 1116 (Ind. 2000) (affirming); *Azania v. State*, 730 N.E.2d 646 (Ind. 2000) (affirming); *Farber v. State*, 729 N.E.2d 139 (Ind. 2000) (affirming); *Ben-Yisrayl v. State*, 729 N.E.2d 102 (Ind. 2000) (affirming); *State v. Holmes*, 728 N.E.2d 164 (Ind. 2000) (reversing); *Williams v. State*, 724 N.E.2d 1070 (Ind. 2000) (affirming).

<sup>z</sup> *Oman v. State*, 737 N.E.2d 1131 (Ind. 2000); *Carr v. State*, 728 N.E.2d 125 (Ind. 2000); *Logan v. State*, 729 N.E.2d 125 (Ind. 2000); *Cutter v. State*, 725 N.E.2d 401 (Ind. 2000); *Sowers v. State*, 724 N.E.2d 588 (Ind. 2000).

<sup>aa</sup> *Troxel v. Troxel*, 737 N.E.2d 745 (Ind. 2000).

<sup>bb</sup> *State v. County Line Park, Inc.*, 738 N.E.2d 1044 (Ind. 2000); *Town Council of New Harmony v. Parker*, 726 N.E.2d 1217 (Ind. 2000); *Bagnall v. Town of Beverly Falls*, 726 N.E.2d 782 (Ind. 2000); *Arnold v. City of Terre Haute*, 725 N.E.2d 869 (Ind. 2000).

<sup>cc</sup> *McIntosh v. Melroe Co.*, 729 N.E.2d 972 (Ind. 2000).

<sup>dd</sup> *Butler v. City of Peru*, 733 N.E.2d 912 (Ind. 2000); *Creasy v. Rusk*, 730 N.E.2d 659 (Ind. 2000); *Groves v. Taylor*, 729 N.E.2d 569 (Ind. 2000); *Mendenhall v. Skinner & Broadbent Co.*, 728 N.E.2d 140 (Ind. 2000); *Cavinder Elevators, Inc. v. Hall*, 726 N.E.2d 285 (Ind. 2000).

<sup>ee</sup> *Smith v. Washington*, 734 N.E.2d 548 (Ind. 2000); *Cahoon v. Cummings*, 734 N.E.2d 535 (Ind. 2000); *Bader v. Johnson*, 732 N.E.2d 1212 (Ind. 2000); *Boggs v. Tri-State Radiology, Inc.*, 730 N.E.2d 692 (Ind. 2000); *Alexander v. Scheid*, 726 N.E.2d 272 (Ind. 2000).

<sup>ff</sup> *Greater Hammond Cmty. Servs., Inc. v. Mutka*, 735 N.E.2d 780 (Ind. 2000); *LCEOC, Inc. v. Greer*, 735 N.E.2d 206 (Ind. 2000); *Celebration Fireworks, Inc. v. Smith*, 727 N.E.2d 450 (Ind. 2000).

<sup>gg</sup> *Ind. Dep't of State Revenue v. Farm Credit Servs. of Mid-Am.*, 734 N.E.2d 551 (Ind. 2000); *State v. Costa*, 732 N.E.2d 1224 (Ind. 2000); *State Bd. of Tax Comm'rs v. Montgomery*, 730 N.E.2d 680 (Ind. 2000).

<sup>hh</sup> *Midwest Sec. Life Ins., Co. v. Stroup*, 730 N.E.2d 163 (Ind. 2000); *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206 (Ind. 2000).

<sup>ii</sup> *Ind. Lawrence Bank v. PSB Credit Serv., Inc.*, 724 N.E.2d 1091 (Ind. 2000).

<sup>jj</sup> *Oil Supply Co., Inc. v. Hires Parts Servs., Inc.*, 726 N.E.2d 246 (Ind. 2000).

<sup>kk</sup> *Bosecker v. Westfield Ins. Co.*, 724 N.E.2d 241 (Ind. 2000).

<sup>ll</sup> *Ross v. State*, 729 N.E.2d 113 (Ind. 2000); *Spangler, Jennings & Dougherty, P.C. v. Ind. Ins. Co.*, 729 N.E.2d 117 (Ind. 2000).

<sup>mm</sup> *Vernon v. Acton*, 732 N.E.2d 805 (Ind. 2000).

<sup>nn</sup> *United States Gypsum, Inc. v. Ind. Gas Co.*, 735 N.E.2d 790 (Ind. 2000); *State v. Costa*, 732 N.E.2d 1224 (Ind. 2000); *Ind. Dep't of Env'tl. Mgmt. v. Med. Disposal Servs., Inc.*, 729 N.E.2d 577 (Ind. 2000); *Town Council of New Harmony v. Parker*, 726 N.E.2d 1217 (Ind. 2000).

<sup>oo</sup> *State Civil Rights Comm. v. County Line Park, Inc.*, 738 N.E.2d 1044 (Ind. 2000).

<sup>pp</sup> *Corcoran v. State*, 739 N.E.2d 649 (Ind. 2000); *State v. Lombardo*, 738 N.E.2d 653 (Ind. 2000); *Boyce v. State*, 736 N.E.2d 1206 (Ind. 2000); *Wieland v. State*, 736 N.E.2d 1198 (Ind. 2000); *Spears v. State*, 735 N.E.2d 1161 (Ind. 2000); *Burnett v. State*, 736 N.E.2d 259 (Ind. 2000); *Joyner v. State*, 736 N.E.2d 232 (Ind. 2000); *Wright v. State*, 730 N.E.2d 713 (Ind. 2000); *Boggs v. Tri-State Radiology, Inc.*, 730 N.E.2d 692 (Ind. 2000); *Noojin v. State*, 730 N.E.2d 672 (Ind. 2000); *State Bd. of Tax Comm'rs v. Montgomery*, 730 N.E.2d 680 (Ind. 2000); *Jenkins v. State*, 729 N.E.2d 147 (Ind. 2000); *Logan v. State*, 729 N.E.2d 125 (Ind. 2000).



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2000); *Lowrimore v. State*, 728 N.E.2d 860 (Ind. 2000); *Lundberg v. State*, 728 N.E.2d 852 (Ind. 2000); *Baxter v. State*, 727 N.E.2d 429 (Ind. 2000); *Sanquenetti v. State*, 727 N.E.2d 437 (Ind. 2000); *Dixie v. State*, 726 N.E.2d 257 (Ind. 2000); *Marcum v. State*, 725 N.E.2d 852 (Ind. 2000); *Turnley v. State*, 725 N.E.2d 87 (Ind. 2000); *Price v. State*, 725 N.E.2d 82 (Ind. 2000); *Young v. State*, 725 N.E.2d 78 (Ind. 2000); *Williams v. State*, 724 N.E.2d 1093 (Ind. 2000); *Sowers v. State*, 724 N.E.2d 588 (Ind. 2000); *Butler v. State*, 724 N.E.2d 600 (Ind. 2000); *Williams v. State*, 724 N.E.2d 1070 (Ind. 2000); *Dunlop v. State*, 724 N.E.2d 592 (Ind. 2000); *State v. Monfort*, 723 N.E.2d 407 (Ind. 2000).





# STATE AND FEDERAL CONSTITUTIONAL LAW DEVELOPMENTS

ROSALIE BERGER LEVINSON\*

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## INTRODUCTION

This Article explores state and federal constitutional law developments over the past year. Part I examines state civil constitutional law cases, while the remaining parts focus on recent developments in the United States Supreme Court, as well as on significant Indiana state and federal cases addressing federal constitutional issues.

### I. DEVELOPMENTS REGARDING THE EQUAL PRIVILEGES AND DUE COURSE OF LAW CLAUSES OF THE STATE CONSTITUTION

#### A. *Martin v. Richey*

Although the Indiana Supreme Court, under the tutelage of Chief Justice Randall T. Shepard, has re-examined the Indiana Constitution as a potential source for the protection of civil liberties,<sup>1</sup> the court has also made it clear that it is not anxious to usurp the legislative role of the General Assembly, and has

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1. See Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).

repeatedly cautioned that state statutes will be presumed constitutional. A constitutional challenger carries a heavy burden of proving a well-grounded historical rationale for judicial activism.<sup>2</sup> Reflecting its reluctance to invalidate state laws, the Indiana Supreme Court, by a narrow 3-2 vote, upheld Indiana's two-year occurrence-based medical malpractice statute of limitations but determined it was unconstitutional *as applied* to a plaintiff who suffered from a medical condition with a long latency period that prevented her from discovering the alleged malpractice within the two-year period.<sup>3</sup> In *Martin v. Richey*,<sup>4</sup> the court left the statute intact on its face but held that its application to Martin's situation violated article I, section 23 of the state constitution,<sup>5</sup> which provides that "[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."<sup>6</sup> In addition, the *Martin* court held that application of the statute violated article I, section 12 of the state constitution,<sup>7</sup> which guarantees that a remedy "by due course of law" is available to anyone "for injury done to him in his person, property, or reputation."<sup>8</sup> Because *Martin* was the first case in recent years in which either of these constitutional provisions was successfully invoked, it sent shock waves through the legal community.

Under the equal privileges analysis, the Indiana Supreme Court, in a 1994 ruling, set forth a two-prong test requiring that any disparate treatment be reasonably related to inherent characteristics that distinguish the unequally treated classes and that the preferential treatment be uniformly applicable and equally available to all persons similarly situated.<sup>9</sup> Previous attempts to invalidate state legislative enactments under this provision had been

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2. For example, in *Mahowald v. State*, 719 N.E. 2d 421, 425-426 (Ind. Ct. App. 1999), the court upheld the Legislators' Retirement System, which grants a legislator who has served for a total of ten years including service on April 30, 1989, a retirement benefit of at least \$400 per month. Mahowald served in the Indiana General Assembly for ten years, but he completed his service in 1975. Thus, he could not take advantage of the new statute and instead was awarded only \$36 per month. The court emphasized that the judiciary must afford the legislature "'wide latitude in determining public policy.'" *Id.* at 424 (quoting *Boehm v. Town of St. John*, 675 N.E.2d 318, 321 (Ind. 1996)). The state can rationally distinguish between retired legislators and current and future legislators and is entitled to consider the fiscal implications of an all-inclusive retirement system. "[F]iscal considerations are a legitimate basis for legislative 'line-drawing.'" *Id.* at 426. The court emphasized that even if the statute was "born of unwise, undesirable or ineffectual policies," the judiciary was not permitted to substitute its belief as to the wisdom of the law for that of the legislature. *Id.* at 426 (citing *State v. Rendleman*, 603 N.E.2d 1333, 1334 (Ind. 1992)).

3. See *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999).

4. *Id.*

5. See *id.* at 1285.

6. IND. CONST. art. I, § 23.

7. See *Martin*, 711 N.E.2d at 1285.

8. IND. CONST. art I, § 12.

9. See *Collins v. Day*, 644 N.E.2d 72, 78-79 (Ind. 1994).



unsuccessful<sup>10</sup> because the Indiana Supreme Court in *Collins* emphasized that substantial deference must be given to legislative judgment and that only where the legislature drew lines in an arbitrary and manifestly unreasonable manner could the court intervene.<sup>11</sup> Nonetheless, Justice Selby, writing for the majority in *Martin*, found that medical malpractice victims who cannot through due diligence discover their injury during the statutory limitation period are denied preferential treatment given to other malpractice victims.<sup>12</sup> The statutory goal of lowering medical costs by encouraging prompt filing of claims becomes irrational as to this group of medical malpractice plaintiffs.<sup>13</sup> Although Justice Selby stated that the statute was unconstitutional only as applied, in his dissent, Chief Justice Shepard opined that he could not envision any cases where the statute would be constitutional. He explained that the very purpose of the statute was to "adopt an event-based limit rather than a discovery-based limit."<sup>14</sup> Thus, although the majority purported to limit its decision to malpractice victims who suffer from a "medical condition with a long latency period which prevents [early discovery]," the crux of the holding is the impermissibility of applying the statute to any malpractice victim who cannot with due diligence discover the tort at an earlier point in time.<sup>15</sup>

In addressing the due course of law claim raised in *Martin*, Justice Selby acknowledged a long line of cases which allow the legislature to modify or abrogate common law rights.<sup>16</sup> Nonetheless, she ruled that the statute was unconstitutional as applied to a plaintiff who has "no meaningful opportunity to file an otherwise valid tort claim within the specified statutory time period."<sup>17</sup> The court reasoned that to apply the statute of limitations in this context "would impose an impossible condition on plaintiff's access to courts and ability to pursue an otherwise valid tort claim."<sup>18</sup> Since *Martin* was unaware she had a malignancy and her doctor had assured her that the mass in her breast was non-life threatening fibrocystic breast disease, applying the statute of limitations to her action would indeed be requiring her "to file a claim before such claim existed."<sup>19</sup>

The court further explicated its *Martin* decision in a companion decision, *Van Dusen v. Stotts*.<sup>20</sup> In *Van Dusen*, the court ruled that plaintiffs like *Martin*

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10. See, e.g., *Mahowald v. State*, 719 N.E.2d 421 (Ind. Ct. App. 1999).

11. See *Collins*, 644 N.E.2d at 80 (referencing *Chaffin v. Nicosia*, 310 N.E.2d 867, 869 (Ind. 1974)).

12. *Martin*, 711 N.E.2d at 1281-82.

13. See *id.*

14. *Id.* at 1286 (Shepard, C.J., dissenting).

15. *Id.* at 1277.

16. See *id.* at 1283 (citing *State v. Rendleman*, 603 N.E.2d 1333 (Ind. 1992); *Sidle v. Majors*, 341 N.E.2d 763 (Ind. 1976)).

17. *Id.* at 1284.

18. *Id.*

19. *Id.* at 1285.

20. 712 N.E.2d 491 (Ind. 1999).



have two years from the time they discover or should have discovered the malpractice and resulting injury or facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice to file their claim.<sup>21</sup> The *Van Dusen* analysis allowed several litigants to successfully litigate medical malpractice claims previously barred by the restrictive statute of limitations.<sup>22</sup>

Despite the majority's reluctance to invalidate the medical malpractice statute of limitations on its face, *Martin* clearly breathed new life into sections 12 and 23 of article I of the Indiana Constitution, inviting practitioners to invoke the state constitution in cases where a statute creates irrational distinctions or "imposes an impossible condition" that operates to arbitrarily deny a remedy for denial of common law rights. On the other hand, because only two justices, Dickson and Boehm, joined Justice Selby's opinion in *Martin*, and Justice Selby soon thereafter stepped down from the court, much uncertainty remains as to the viability of state constitutional arguments brought under these provisions.

### *B. Application of Martin to Other Medical Malpractice Cases*

The Indiana Supreme Court re-examined its holding in *Martin* in *Boggs v. Tri-State Radiology, Inc.*<sup>23</sup> *Boggs* presented the court with a woman who discovered the malpractice within the two-year period—eleven months before the time period expired—but whose surviving spouse did not file a claim until several months outside the limitations period.<sup>24</sup> As detailed by the court of appeals, the plaintiff was told following a mammogram that there was no abnormality, but subsequently she learned she had stage IV breast cancer and died a year later at the age of fifty-two.<sup>25</sup> Because, unlike *Martin*, the plaintiff in *Boggs* was not denied a meaningful opportunity to bring a claim, the appellate

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21. See *id.* at 499.

22. See, e.g., *Ling v. Stillwell*, 732 N.E.2d 1270, 1274-75 (Ind. Ct. App. 2000) (holding that it is unconstitutional to apply two-year statute of limitations to plaintiff who could not reasonably have been expected to discover that his mother's death could have been the result of misconduct or medical malpractice until after the limitations period had passed; events surrounding investigation into mother's death prior to the expiration of the limitations period did not put plaintiff on notice that malpractice was involved); *Weinberg v. Bess*, 717 N.E.2d 584, 589-90 (Ind. 1999) (finding that because plaintiff had no reason to suspect that her doctor gave her silicone rather than the saline breast implants she requested, her filing of a complaint two months after she discovered the truth was not time barred); *Halbe v. Weinberg*, 717 N.E.2d 876, 881-82 (Ind. 1999) (deciding same ruling upon identical fact pattern as *Bess*). Cf. *Burton v. Elskens*, 730 N.E.2d 1281, 1285 (Ind. Ct. App. 2000) (two-year statute of limitations for medical malpractice action of patient who sustained a stroke following surgery should not be tolled where patient did not suffer from disease with long latency; patient's condition was not one which patient, in the exercise of reasonable diligence, could not have discovered within two-year statutory period).

23. 730 N.E.2d 692 (Ind. 2000).

24. See *id.* at 695.

25. See *Boggs v. Tri-State Radiology, Inc.*, 716 N.E.2d 45, 46 (Ind. Ct. App. 1999), superseded by 730 N.E.2d 692 (Ind. 2000).



court found no violation of the due course of law provision.<sup>26</sup> The court reasoned, however, that since *Van Dusen* allowed malpractice victims two years in which to file if they discover the wrongdoing even one day outside the limitations period, it would be arbitrary and irrational to disallow those who discover the malpractice one day or one hour before the end of the two years to lose their claim unless they act immediately.<sup>27</sup> Thus, Boggs argued he was entitled to the same two year period from the date of discovery that was afforded *Van Dusen* and *Martin*.

The Indiana Supreme Court rejected Boggs' argument and refused to address the hypothetical plaintiff who discovers the malpractice on the eve of the two-year cutoff.<sup>28</sup> Focusing on the specific facts in *Boggs*, Justice Boehm, who joined the majority opinion in *Martin*, posed the question as "whether the statute of limitations is constitutional as applied to patients who discover the malpractice well before the expiration of the limitations period, but some time after the act of malpractice."<sup>29</sup> The court determined that the fact that medical malpractice plaintiffs will often have varying amounts of time within which to file their claims is not sufficient to create an impermissible classification under article I, section 23. The court recognized the far reaching impact of affirming the appellate court's reasoning:

All statutes of limitations are to some degree arbitrary. The logic of the Court of Appeals would render every statute of limitations or repose a discovery-based statute as a matter of constitutional law. This would significantly undermine the fundamental objective of limitations periods, which recognizes value in the certainty generated by a known date after which a claim is either asserted or expires.<sup>30</sup>

Because Boggs had an eleven-month window to file the medical malpractice claim and it was not impractical or impossible for him to do so, the law was constitutional as applied.<sup>31</sup> Addressing the appellate court's hypothetical plaintiff, the court recognized that there might be situations when discovering and presenting the claim within the time demanded by the statute might not be reasonably possible, but this was simply not such a case.<sup>32</sup>

In dissent, Justice Sullivan, who disagreed with *Martin*, nonetheless reasoned that *Van Dusen* mandated that medical malpractice victims be given two years

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26. *See id.* at 48.

27. *See id.* at 50.

28. *See Boggs*, 730 N.E.2d at 697-98.

29. *Id.* at 697.

30. *Id.*

31. *See id.* at 698; *see also* *Coffer v. Arndt*, 732 N.E.2d 815, 819-22 (Ind. Ct. App. 2000) (holding that application of two-year occurrence-based limitations period to patient who learned of malpractice two months after malpractice but did not file until twenty-six months after occurrence was time-barred; because patient had twenty-two-month window in which to file, application of the limitations period was constitutional).

32. *See Boggs*, 730 N.E.2d at 697-98.



from the time of discovery in which to file. Thus, the majority opinion created a class of plaintiffs to whom the statute of limitations is not uniformly applicable. Justice Sullivan reasoned that "we cannot make the two-year medical malpractice statute of limitations available to plaintiffs who do not discover the malpractice until more than two years after occurrence but deny it to those who discover it within two years of occurrence."<sup>33</sup> Because Justice Selby rejected a facial attack and determined the limitations period was unconstitutional only *as applied*, the majority approach of making case by case assessments regarding arbitrariness and irrationality is arguably consistent with *Martin*. It does, however, create uncertainty regarding victims who do not discover the malpractice until weeks or days before the two-year period expires.

### C. Court Refuses to Extend *Martin's* Rationale to Products Liability Claims

Attempts to expand the rationale of *Martin* outside Indiana's Medical Malpractice Act have not been successful. On May 26, 2000, the Indiana Supreme Court rejected the *Martin* rationale as applied to the ten-year statute of repose in Indiana's Product Liability Act.<sup>34</sup> The Indiana Supreme Court ruled in *Dague v. Piper Aircraft Corp.*,<sup>35</sup> that the statute did not violate section 12's requirement that "[all] courts shall be open."<sup>36</sup> In *McIntosh*, the plaintiff was injured in an accident involving a skid steer loader that had been purchased some thirteen years earlier. Indiana law requires product liability actions be commenced "within ten (10) years after delivery of the product to the initial user or consumer."<sup>37</sup> Emboldened by *Martin*, the plaintiff contended the statute violated the right-to-remedy clause of section 12 as well as the equal privileges requirement of section 23. The court, in a 3-2 opinion, rejected both claims.<sup>38</sup>

The court held that the open courts requirement of section 12 was not violated because the General Assembly retains the power "to identify legally cognizable claims for relief."<sup>39</sup> It reasoned that in *Martin* the cause of action accrued before the plaintiff was aware of the cause whereas here, "the statute extinguished any cause of action before the plaintiffs' claims accrued."<sup>40</sup> Also, "[t]he legislature has provided that after the product is in use for 10 years, no further claims accrue."<sup>41</sup> The majority emphasized that there is no right to redress every injury nor is there a constitutional right to any particular remedy. In essence, the court drew a distinction between a statute of limitations that limits a claim within a certain period of time and a repose statute that says a person has

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33. *Id.* at 700 (Sullivan, J., dissenting).

34. *See McIntosh v. Melroe Co.*, 729 N.E.2d 972 (Ind. 2000) (Boehm, J.).

35. 418 N.E.2d 207, 213 (Ind. 1981).

36. IND. CONST. art. I, § 12.

37. IND. CODE § 34-20-3-1(b)(2) (2000).

38. *See McIntosh*, 729 N.E.2d at 973.

39. *Id.* at 976.

40. *Id.* at 978.

41. *Id.*



no remedy even before the action occurs. In *Martin*, the court ruled that a claim that exists cannot be barred before it is knowable, whereas in *McIntosh* the law simply provides “that products that produce no injury for ten years are no longer subject to claims under the Product Liability Act.”<sup>42</sup>

Finally, although the court recognized that section 12 is analogous to federal substantive due process in requiring that legislation be rationally related to a legitimate government goal, it found no difficulty concluding that the law was justifiable. The law simply reflects the notion that “in the vast majority of cases, failure of products over ten years old is due to wear and tear or other causes not the fault of the manufacturer.”<sup>43</sup> Further, the statute “serves the public policy concerns of reliability and availability of evidence after long periods of time, and the ability of manufacturers to plan their affairs without the potential for unknown liability.”<sup>44</sup>

Addressing the section 23 claim, the court relied on the same findings—the distinction drawn between persons injured by products less than ten years old and those injured by products more than ten years old—to find that the law is rationally related to the legislative goals. The court cautioned that a broader interpretation of section 23 to invalidate statutes that permit remedies for some losses but not other similar losses “is a truly startling proposition” that “would invalidate a host of regulatory statutes.”<sup>45</sup> The court also found that the statute did not violate the *Collins* requirement that preferential treatment be provided to all similarly situated persons. Unlike the situation in *Martin*, the *McIntoshes* did not belong to a subset class that was treated differently in that all persons injured more than ten years after a product is initially sold receive similar treatment. Most significantly, the majority rejected the dissent’s assertion that less deference needs to be given the legislative judgment as to this second prong in *Collins*.<sup>46</sup>

In a stinging dissent, Justice Dickson, joined by Justice Rucker, found that the statute violated both the due course of law provision of section 12 as well as the equal privileges and immunities clause of section 23.<sup>47</sup> Specifically, Justice Dickson argued that the majority opinion “strips *Martin* of its rationale and restricts it to the narrowest possible holding.”<sup>48</sup> Tracing the historical roots of section 12, Justice Dickson advocated finding that section 12 provides “a substantive right to remedy for injuries suffered.”<sup>49</sup> Under his reasoning, although such a right could be qualified, it may not be totally abrogated. Because the repose provision bars claims even when products are designed and expected to last for decades, it should be held unconstitutional. As Justice Dickson

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42. *Id.* at 979.

43. *Id.* at 980.

44. *Id.*

45. *Id.* at 982.

46. *See id.* at 983.

47. *See id.* at 985 (Dickson, J., dissenting).

48. *Id.* at 989 n.17.

49. *Id.* at 988.



reasoned, the statute "is especially pernicious to those economically disadvantaged citizens who must rely on older or used products rather than new ones."<sup>50</sup>

Comparing the case to *Martin*, Justice Dickson found that the statute in *McIntosh* similarly required plaintiffs to file a claim before they were able to discover the allegedly negligent conduct and resulting injury, thus imposing an impossible condition on access to the courts.<sup>51</sup> In addition, he found that by "artificially distinguishing as a separate class those citizens injured by defective products more than ten years old," the statute violates the Equal Privileges and Immunities Clause.<sup>52</sup> Unlike the majority, Justice Dickson focused on the unequal treatment of different classes of people, rather than classes of products.<sup>53</sup>

Obviously, the stark differences in interpretation of the Indiana Constitution reflect a split on the court, which leaves some uncertainty as to how the constitutional provisions will be interpreted in the future. Justices Dickson and Rucker clearly favor a broad reading of both section 12 and section 23, whereas Justice Boehm, whose vote was critical in *Martin*, has clearly decided to proceed more cautiously in evaluating constitutional restrictions on the General Assembly's authority to legislate. His opinion in *McIntosh*, as well as the subsequent ruling in *Boggs*, suggest that plaintiff's attorneys have an uphill battle to fight in building on the *Martin* rationale.

#### D. Looking to the Future

One of the most critical questions raised in the wake of *McIntosh* is the amount of deference the court will give to legislative restrictions on remedies. In *Sims v. U.S. Fidelity & Guaranty Co.*,<sup>54</sup> the court of appeals addressed the constitutionality of a provision in the Worker's Compensation Act which gives exclusive jurisdiction to the Worker's Compensation Board to adjudicate whether an employer or worker's compensation insurance carrier "has acted with a lack of diligence, in bad faith, or has committed an independent tort in adjusting or settling [a worker's compensation claim]."<sup>55</sup> John Sims, who was injured while working at a construction site, contacted the defendant carrier to schedule medical care and to secure payment of temporary total disability benefits. After receiving no response for some four weeks, Sims filed a complaint accusing the defendant of gross negligence, intentional infliction of emotional distress, and intentional deprivation of statutory rights under the Worker's Compensation Act for denying him benefits and also constructively denying him access to timely medical care and physical therapy.<sup>56</sup> The trial court dismissed Sim's complaint

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50. *Id.* at 990.

51. *See id.* at 989 n.17.

52. *Id.* at 991.

53. *See id.* at 991-92.

54. 730 N.E.2d 232 (Ind. Ct. App. 2000).

55. IND. CODE § 22-3-4-12.1(1) (2000).

56. *See Sims*, 730 N.E.2d at 234.



based on the statutory exclusion.

In 1992 the Indiana Supreme Court ruled that the exclusive remedy provision in the Worker's Compensation Act did not apply to the right of an employee to assert actions against third parties such as the insurance carrier.<sup>57</sup> However, after *Sims*, the statute was amended to exclude such claims.<sup>58</sup> In fact, as the court of appeals conceded, the statute may have been passed in reaction to this prior case law.<sup>59</sup> Nonetheless, the court concluded that the statute violated article I, section 12 in that the legislature unreasonably and impermissibly denied the right of access to the courts. The statute's impact is "to deprive injured workers who have been *subsequently* harmed by the malfeasance of the insurer the right to a complete tort remedy."<sup>60</sup> The court reasoned that the purpose of the act was to compensate workers for injuries sustained on the job whereas here the injury arose from subsequent, additional injuries. Therefore, it would be illogical to utilize the act to shield insurers from liability for their own independent torts.<sup>61</sup> In addition, the court found that the statute violated the right to trial by jury protected by article I, section 20 of the Indiana Constitution. Although the right to a jury trial applies only to actions "triable by a jury at common law . . . , actions for injuries to the person caused by another's negligence were actionable under the common law of England and triable by jury."<sup>62</sup>

In dissent, Judge Baker raised several arguments. First, he noted that plaintiff's tort action would not even exist but for the Worker's Compensation Act.<sup>63</sup> Second, unlike *Martin*, the act does not totally foreclose access to the courts, but simply imposes a trip to the compensation board as a pre-requisite to an appeal through the court system. In this sense the statute operates no differently than the Medical Malpractice Act, which requires aggrieved plaintiffs to first take their claims to a review board before filing suit in court. "[The] statute is not unconstitutional merely because it alters or restricts the manner of achieving a remedy in the court system."<sup>64</sup> Third, Judge Baker cited to *McIntosh* as reaffirming the General Assembly's authority to modify the common law.<sup>65</sup> Fourth, he accused the majority of erroneously relying on cases decided *before* the statute came into effect.<sup>66</sup> Finally, he found no violation of the right to jury trial because lack of a jury trial was simply "one of the policy trade-offs involved in guaranteeing to workers a system of compensation superior to that which preceded it."<sup>67</sup> On the other hand, the dissent expressed its concern for the

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57. See *Stump v. Commercial Union*, 601 N.E.2d 327, 331-32 (Ind. 1992).

58. See IND. CODE § 22-3-4-12.1 (2000).

59. See *Sims*, 730 N.E.2d at 238 (Baker, J., dissenting).

60. *Id.* at 236 (emphasis in original).

61. See *id.* at 236-37.

62. *Id.* at 237 (internal citations omitted).

63. See *id.* at 238-39 (Baker, J., dissenting).

64. *Id.* at 238.

65. See *id.* (citing *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 977-78 (Ind. 2000)).

66. See *id.* at 238 n.3.

67. *Id.* at 239.



\$20,000 limitation set forth in this statute, which might very well preclude meaningful recovery in some cases. Judge Baker urged the legislature "to consider raising the \$20,000 limitation on recovery to avoid constitutional challenges in the future."<sup>68</sup>

## II. THE DUE PROCESS CLAUSE

Although the text of the Due Process Clause appears to ensure only procedural fairness, the U.S. Supreme Court has long recognized that it also contains a substantive component that bars arbitrary, wrongful conduct. Where the government interferes with a fundamental right, the Court has demanded that the conduct meet a strict scrutiny standard. The Supreme Court has ruled that parents have a fundamental right to guide the upbringing of their children and that government interference with this right must be strictly scrutinized.<sup>69</sup> This term, in *Troxel v. Granville*,<sup>70</sup> the Supreme Court decided that this right—"perhaps the oldest of the fundamental liberty interests recognized by this Court"—trumps the interest of grandparents who seek visitation.<sup>71</sup> However, a majority could only agree that the law's sweeping breadth and application in this case violated the mother's constitutional rights.<sup>72</sup> Thus, the opinion provides little guidance to other states, all of which in recent years have enacted Grandparent Visitation Statutes.

At issue in *Troxel* was a Washington law that permitted "any person" to petition for visitation rights "at any time" whenever such visitation would be in the child's best interest.<sup>73</sup> Paternal grandparents sought to obtain visitation of their deceased son's two young daughters, who were in the custody of their mother. The father had never married the mother and her new husband adopted the children. The mother was willing to grant the grandparents visitation of one day per month plus participation in holiday celebrations, but the grandparents wanted more. The trial court granted them one weekend of visitation per month, one week in the summer, and time on the grandparents' birthdays. The Washington Supreme Court declared the statute unconstitutional on its face because it interfered with parental rights without any showing of harm.<sup>74</sup>

The Supreme Court, in a splintered decision, ruled that the trial court violated the mother's fundamental right to make decisions concerning the care, custody and control of her children.<sup>75</sup> In writing the plurality opinion, Justice O'Connor termed the statute "breathhtakingly broad" because it "effectively permits any

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68. *Id.*

69. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

70. 120 S. Ct. 2054 (2000).

71. *Id.* at 2060.

72. *See id.* at 2064.

73. WASH. REV. CODE § 26.10.160(3) (2000).

74. *See Troxel*, 120 S. Ct. at 2057-58.

75. *See id.* at 2061.



third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to a state-court review."<sup>76</sup> The trial court infringed on the mother's substantive due process rights by ignoring the traditional presumption that fit parents act in the best interest of their children.<sup>77</sup> The trial court appeared to require the mother to disprove that visitation by the grandparents would be in her daughters' best interest. Justice O'Connor reasoned that as long as a parent adequately cares for her children "there will normally be no reason for the state to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."<sup>78</sup> There were no "special factors" here, i.e., unfitness of a parent or total denial of visitation that might justify state interference with the mother's fundamental right.<sup>79</sup>

Because of the sweeping breadth of the statute and the application in this case, Justice O'Connor refused to address the core constitutional question of "whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation."<sup>80</sup> She left unanswered the basic question of whether use of a "best interest" test is constitutionally permitted. Nor did she address who should have standing to assert visitation rights, nor even the primary question of whether grandparents have any substantive due process liberty interest in visitation rights. She simply concluded that the problem was that the law as applied here gave no deference to the mother's views. The "breathhtakingly narrow" scope of Justice O'Connor's plurality opinion leaves the fate of dozens of state laws in doubt.

In a separate concurrence, Justice Souter would have affirmed the state's Supreme Court's decision to invalidate the visitation statute on its face because it allowed interference with parental rights without a showing of harm.<sup>81</sup> Justice Thomas concurred, emphasizing that because the statute infringed on fundamental rights, it must be subjected to strict scrutiny. He found that the state lacked any compelling interest in "second-guessing a fit parent's decision regarding visitation with third parties."<sup>82</sup>

Three dissenters argued that the law was neither facially invalid nor invalid as applied. Justice Stevens would not have required a showing of actual or potential harm to the child before allowing visitation over a parent's objection. He argued that the Washington Supreme Court ignored the fundamental liberty interest of the child—there may be situations where the child has a stronger interest than mere protection from serious harm caused by termination of

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76. *Id.*

77. *See id.* at 2061-62.

78. *Id.* (citation omitted).

79. *See id.*

80. *Id.* at 2064.

81. *See id.* at 2065-66 (Souter, J., concurring).

82. *Id.* at 2068 (Thomas, J., concurring).



visitation by a person other than a parent.<sup>83</sup> He contended that the Due Process Clause allows a state to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interest of the child.<sup>84</sup> Similarly Justice Kennedy said the Washington Supreme Court erred "by announcing a categorical rule that third parties who seek visitation must always prove the denial of visitation would harm the child," instead of basing the decision on the child's best interest.<sup>85</sup> Justice Scalia deemed the extension of the doctrine of Substantive Due Process inappropriate to this context, and he chastised the majority for creating "a new regime of judicially prescribed, and federally prescribed, family law."<sup>86</sup> He argued that issues touching on parents' rights to direct the upbringing of their children are best left to the state legislature.<sup>87</sup>

Although there was no majority opinion, the *Troxel* decision clearly affects the Grandparent Visitation Laws enacted by all fifty states between 1966 and 1986. The Court recognized the fundamental right of parents, not grandparents or state court judges, to decide what is best for their children. On the other hand, the ruling leaves open the door to visitation rights for non-parents who have strong bonds with children. Although the decision does not declare all laws unconstitutional simply because they use a "best interest of the child" approach, it clearly directs that in applying their statutes, state judges must weigh the parents' interest more heavily.

Prior to *Troxel*, Indiana courts had sustained Indiana's Grandparent Visitation Act,<sup>88</sup> which, unlike the Washington statute, provides more specificity for when it can be invoked (e.g., only where parents have divorced, one parent has died, a child is born out of wedlock, or in certain adoption situations).<sup>89</sup> In *Sightes v. Barker*,<sup>90</sup> an Indiana appellate court held that the Act, dating back to 1981, did not unconstitutionally burden the parents' right to raise their children. The court reasoned that even under strict scrutiny, the state had a compelling interest in protecting the welfare of a child.<sup>91</sup> It stressed that the burden was on the grandparents to demonstrate by a preponderance of the evidence that visitation is in the child's best interest, and, that even "[i]f such a showing is made, it falls to the court to evaluate the evidence, assess the circumstances, and carefully devise a visitation schedule that is in the children's best interest."<sup>92</sup> The

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83. See *id.* at 2069-70 (Stevens, J., dissenting).

84. See *id.* at 2071.

85. *Id.* at 2076 (Kennedy, J., dissenting).

86. *Id.* at 2075 (Scalia, J., dissenting).

87. See *id.*

88. IND. CODE § 31-17-5-1 (2000).

89. The Act was amended in 1997 to cut off visitation rights to a paternal grandparent of a child born out of wedlock if the child's father has not established paternity. See IND. CODE § 31-17-5-1(b).

90. 684 N.E.2d 224 (Ind. Ct. App. 1997).

91. See *id.* at 233.

92. *Id.* at 230.



court specifically noted that judicial oversight will ensure protection against “an unwarranted intrusion into the fundamental liberty of the parents and child.”<sup>93</sup> Because visitation would be granted only if after careful scrutiny, the court determined such visitation was in the child’s best interest, the Act was no more intrusive than necessary.<sup>94</sup> Although *Troxel* challenges whether the best interest of the child can suffice to trump parents’ rights,<sup>95</sup> the more restricted scope and narrow construction of the law may mean that it at least can survive a facial challenge.

Although the Supreme Court in *Troxel* did not invalidate the Washington statute on its face, it did rule that the Washington trial judge erred in failing to give sufficient weight to the parents’ interest.<sup>96</sup> Indiana courts have not taken this approach. In *Swartz v. Swartz*,<sup>97</sup> the court ruled that a trial court judge abused his discretion in granting grandparents regular, overnight visitation. The St. Joseph Superior Court had awarded the grandparents visitation with a nine- year-old child every other weekend, alternating among the grandparents’ three homes, since one set of grandparents had divorced and remarried new spouses. Each grandparent also was granted one week of visitation during the summer.<sup>98</sup> The appellate court found that this schedule would require the child to live outside of her mother’s home seventy-three days per year and thus would “fundamentally alter the relationship between Mother and C.S., which by all accounts was close, healthy, and loving.”<sup>99</sup> Additionally, the child would be living in four different households on alternating weekends. The court emphasized that this was not a case of access, since the mother had agreed to unsupervised daytime visitation with the grandparents, but rather was simply a matter of degree, and here the trial court overstepped its bounds.<sup>100</sup> In light of the subsequent *Troxel* decision, it would appear the court of appeals was correct in its reasoning.

Reiterating the holding in *Sightes*, the court in *Swartz*, while finding an impermissible application of the Act, held the visitation rights conferred by the statute did not substantially infringe on parents’ fundamental right to raise their children because it “only contemplates occasional, temporary visitation as found to be in the best interest of the child” and thus met even strict scrutiny analysis.<sup>101</sup>

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93. *Id.* at 231.

94. *See id.* at 233.

95. The court specifically acknowledged a Tennessee Supreme Court decision holding that states cannot interfere with parental rights unless substantial harm threatens a child’s welfare. The court found that this same standard does not apply under the federal constitution in the absence of a substantial infringement by the state on a family relationship, and it found that Indiana’s Grandparent Visitation Statute did not impose this type of substantial burden. *See id.* at 231, 232 n.2 (citing *Hawk v. Hawk*, 855 S.W.2d 573, 582 (Tenn. 1993)).

96. *See Troxel v. Granville*, 120 S. Ct. 2054, 2060-61 (2000).

97. 720 N.E.2d 1219 (Ind. Ct. App. 1999).

98. *See id.* at 1221.

99. *Id.* at 1222.

100. *See id.* at 1222-23.

101. *Id.* at 1222.



Although *Troxel* has cast doubt on the broad, undifferentiated use of a "best interest" test to override parental rights, it appears that Indiana courts have cautiously applied the law, giving significant weight to parents' wishes.<sup>102</sup>

A second, far more contentious substantive due process case addressed the question of whether states may bar a widely used second-trimester abortion procedure.<sup>103</sup> The Nebraska statute in question banned any procedure that involved "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child."<sup>104</sup> The procedure has been tagged "partial birth" abortion by its opponents. Under the Nebraska statute, violation of the law is a felony, carrying a penalty of up to twenty years in prison, a fine of up to \$25,000, and it provides for automatic revocation of a convicted doctor's state license to practice medicine.<sup>105</sup> Dr. LeRoy Carhart is the only physician in the state of Nebraska who performs second-term abortions. He contested the constitutionality of the law and, following a trial, a federal court judge agreed that the ban was unconstitutional because it forced the doctor to use a riskier surgery on some patients.<sup>106</sup> The Eighth Circuit affirmed, and the state, supported by some thirty states that have enacted similar laws, appealed.<sup>107</sup>

Eight years ago the Supreme Court, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>108</sup> upheld the basic principle of *Roe v. Wade*,<sup>109</sup> that the Constitution protects a woman's right to terminate a pregnancy.<sup>110</sup> *Casey* determined, however, that a state has the right to regulate the abortion decision before fetal viability provided it does not impose an "undue burden," i.e., it does not have the purpose or effect of placing a substantial obstacle in a woman's attempt to obtain an abortion.<sup>111</sup> The precise meaning of the "undue burden" test has created much uncertainty. In *Casey* only one of several contested provisions (a requirement of spousal notice), was found to impose a constitutionally

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102. See, e.g., *In re Visitation of J.P.H.*, 709 N.E.2d 44, 47 (Ind. Ct. App. 1999) (granting visitation to paternal grandparents of child born out of wedlock but later legitimated against the wishes of the parents would have constituted unwarranted encroachment into right of custodial parents to raise their child as they sought fit); *Lockhart v. Lockhart*, 603 N.E.2d 864, 867 (Ind. Ct. App. 1992) ("As a pure matter of law, the statute clearly requires that grandparents may not obtain visitation against the wishes of a custodial parent;" thus visitation would not be permitted where the grandparents' son was awarded custody.).

103. *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000).

104. *Id.* at 2605 (citing NEB. REV. STAT. § 28-328(1) (Supp. 1999)).

105. See NEB. REV. STAT. § 328(2) (Supp. 1999).

106. See *Stenberg*, 120 S. Ct. at 2610.

107. See *id.* at 2634.

108. 505 U.S. 833 (1992).

109. 410 U.S. 113 (1973).

110. See *Planned Parenthood of S.E. Pa.*, 505 U.S. at 852-53.

111. *Id.* at 878.



impermissible "undue burden."<sup>112</sup> After viability, the state, in promoting its interest to protect potential human life, may regulate, and "even prescribe, abortion except where it is necessary, inappropriate medical judgment, for the preservation of the life or health of the mother."<sup>113</sup>

The Court in *Stenberg* held that the Nebraska law violated both of these basic principles because it lacked any exception for the preservation of a mother's health, and its definition of the prescribed procedure was so broad as to include the most frequently used second-trimester abortion method, thus imposing an undue burden.<sup>114</sup> The statute did not distinguish between abortions performed before or after viability, but it failed both tests because it did not provide any health exception for pre- or post-viable abortions. "[A] State may promote but not endanger a woman's health when it regulates the methods of abortion."<sup>115</sup> Despite significant conflicting medical evidence, the Court reasoned that the district court's determination that the prescribed method was the safest procedure under some circumstances was supported by the record.<sup>116</sup> Further, even if the statute's basic target was to ban dilation and extraction (D & X), whereby the fetus is delivered through the cervix feet first, and the skull is then collapsed and extracted through the cervix, the statutory language made clear that it covered a much broader category of procedures.<sup>117</sup> The district court judge conducted extensive fact finding and established that the law would have the effect of prohibiting the most common form of abortion (dilation and evacuation) and that the intended effect was to prohibit a procedure (dilation and extraction) that was the safest procedure for late pre-viable abortions.<sup>118</sup>

In a separate concurrence, Justice O'Connor pointed out that

[b]y restricting their prohibitions to the D & X procedure exclusively, the Kansas, Utah, and Montana statutes avoid a principal defect of the Nebraska law . . . a ban on partial-birth abortion that only proscribed the D & X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional in my view.<sup>119</sup>

Although Justice O'Connor's dictum is a non-binding opinion, her vote was critical in forming a majority. Hence, states will have to determine whether their own laws are more like the broad statute enacted by Nebraska, or the more narrow prohibitions, which arguably would muster majority support on this Court.

Three of the four dissenters argued that *Casey* was wrongly decided and should be overturned. Justice Kennedy, although he co-authored the plurality

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112. *See id.* at 893-94.

113. *Id.* at 879.

114. *See Stenberg v. Corhart*, 120 S. Ct. 2597, 2609 (2000).

115. *Id.*

116. *See id.* at 2610-13.

117. *See id.* at 2614.

118. *See id.* at 2610-13.

119. *Id.* at 2619-20 (O'Connor, J., concurring).



opinion in *Casey*, determined that because the D & X method more strongly resembled infanticide, "Nebraska could conclude the procedure presents a greater risk for disrespect for life and a consequent greater risk to the profession and society."<sup>120</sup> Justice Kennedy thought the Court lacked authority to second guess the states' determination. The majority opinion was a victory for the pro-choice movement—the opinion invalidated restrictions on abortions adopted by many states in favor of protecting a woman's "fundamental individual liberty," a term carefully avoided in *Casey*, which instead discussed the "core" liberty interest.<sup>121</sup> However, it is likely that O'Connor's concurrence in *Stenberg* means that state abortion laws will be upheld in the future even using the "undue burden" test she fashioned in *Casey*.

### III. EQUAL PROTECTION

Most litigation brought under the Equal Protection Clause addresses bias against a "discrete and insular" minority. In recent years, however, there has been a proliferation of suits alleging selective enforcement of civil laws against individuals for reasons unrelated to their membership in any group. This Term the Supreme Court entered the fray, holding in *Village of Willowbrook v. Olech*,<sup>122</sup> that a single individual constituting a "class of one" may assert an equal protection claim where conduct by municipal government lacks a rational basis.<sup>123</sup> Olech, a homeowner, alleged that the Village violated her rights when it demanded a thirty-three-foot easement on her property for connection to the municipal water supply whereas other similarly situated property owners were required to grant only a fifteen-foot easement.<sup>124</sup> Olech contended that the demand was "irrational and wholly arbitrary."<sup>125</sup> She claimed the Village was discriminating against her because she had previously successfully sued the Village on another matter. The Seventh Circuit reasoned that to prevent a flood of litigation, such zoning denial cases could proceed only where the plaintiff alleged subjective ill-will or spite.<sup>126</sup> The Supreme Court in a brief five-paragraph per curiam decision held that Mrs. Olech stated a proper Equal Protection Claim when she alleged that she was intentionally treated differently from others similarly situated and there was no rational basis for the difference in treatment. The Court ruled that, "[t]hese allegations, quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis."<sup>127</sup> However, the opinion failed to articulate what Mrs. Olech must prove in order to prevail.

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120. *Id.* at 2626 (Kennedy, J., dissenting).

121. *Casey*, 505 U.S. at 852.

122. 120 S. Ct. 1073 (2000) (per curiam).

123. *Id.* at 1074.

124. *See id.*

125. *Id.*

126. *See id.*

127. *Id.* at 1075.



In a separate concurrence, Justice Breyer argued that requiring the additional factor of "vindictive action," "illegitimate animus," or "ill-will" relied on by the Seventh Circuit is important "to minimize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right."<sup>128</sup> Indeed in the wake of *Olech* the Seventh Circuit has reaffirmed the need to show some "illegitimate animus" as a necessary element in proving so-called vindictive action equal protection claims. In *Hilton v. Wheeling*,<sup>129</sup> the court reasoned that *Olech* did not clarify the precise role of motive because it did not reach the theory of subjective ill-will in the context of challenges to police enforcement of the law.<sup>130</sup> Following Justice Breyer's lead, Judge Posner reasoned that something more must be proved so as not to improperly mire federal courts in "local enforcement of petty state and local laws."<sup>131</sup> Thus, although *Olech* appeared to open the federal court doors to challenging arbitrary, irrational government abuse of power, it remains to be seen how extensively the Equal Protection Clause will actually be used.

#### IV. FREEDOM OF SPEECH AND ASSOCIATION

Despite a continuously shrinking docket (only seventy-seven cases were decided this term) the Supreme Court ruled on about a half a dozen First Amendment cases that covered a wide variety of topics.

##### *A. The Right to Protest*

It is well recognized that a central purpose of the First Amendment is to prevent government from punishing speech on the basis of its content. Where government is seeking to suppress a particular message or a particular speaker, a strict scrutiny standard must be met—the regulation must be necessary to serve a compelling interest and it must be no more extensive than necessary.<sup>132</sup> Conversely, where government does not seek to suppress the content, but merely to control the time, manner, or place of the speech, a less restrictive standard is applied.<sup>133</sup> In *Hill v. Colorado*,<sup>134</sup> the Court, in a 6-3 decision, upheld a Colorado statute making it unlawful for any person within one hundred feet of a health care facility entrance "to 'knowingly approach' within eight feet of another person, without that person's consent, 'for the purpose of passing a leaflet or handbill, displaying a sign, or engaging in oral protest, education, or counseling'" with that person.<sup>135</sup> The majority concluded that the law was a content neutral regulation, whereas three dissenters argued that the statute was an unconstitutional content-

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128. *Id.* (Breyer, J., concurring).

129. 209 F.3d 1005 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 781 (2001).

130. *See id.* at 1008.

131. *Id.*

132. *See* *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 101-02 (1972).

133. *See* *Ward v. Rock Against Racism*, 491 U.S. 781, 803 (1989).

134. 120 S. Ct. 2480 (2000).

135. *Id.* at 2484 (quoting COLO. REV. STAT. § 18-9-122(3) (1999)).



based regulation aimed at pro-life protesters.<sup>136</sup>

In 1997, in *Schenck v. Pro-Choice Network of Western New York*,<sup>137</sup> the Court held that a judge-issued injunction creating a speech-free "floating buffer zone" with a fifteen-foot radius violated the First Amendment.<sup>138</sup> In *Hill* the Court reviewed a Colorado Supreme Court decision upholding the state's eight-foot buffer zone law.<sup>139</sup> In affirming the state ruling, the Court found there was much more than a seven-foot difference to distinguish the two cases.

Before passage of the Colorado Act, plaintiffs had engaged in "sidewalk counseling" on the public ways and sidewalks surrounding abortion clinics.<sup>140</sup> They challenged the statute as an unconstitutional content-based regulation because the content of their speech had to be examined in order to determine whether the speech "constitutes oral protest, counseling and education."<sup>141</sup> Further, they argued that the statute was overbroad because it substantially affected their ability to engage in oral communication and to distribute leaflets in a "quintessential" public forum.<sup>142</sup>

The Supreme Court recognized the strong competing interests in this case—namely the States' right to protect the health and safety of its citizens versus the plaintiffs' right to engage in traditionally protected protest speech. It found, however, a "significant difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication."<sup>143</sup> The Court recognized an important privacy interest in avoiding "unwanted communication" as well as citizens' right of "passage without obstruction."<sup>144</sup> The Court explained that "the First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests."<sup>145</sup>

The most contested ruling was the majority's finding that this was a content neutral law. Justice Stevens reasoned that it did not regulate speech, but "[r]ather it is a regulation of the places where some speech may occur."<sup>146</sup> The statute was not adopted because of disagreement with the message it conveyed, and the statutory language made no reference to the content of the speech. Further, "the State's interest in protecting access and privacy . . . [were] . . . unrelated to the content of the demonstrators' speech."<sup>147</sup> For these reasons, Justice Stevens concluded that the statute represented a content neutral restriction that only had

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136. See *id.* at 2488, 2503.

137. 519 U.S. 357 (1997).

138. See *Hill*, 120 S. Ct. at 2487 (quoting *Schenck*, 519 U.S. at 361).

139. See *Hill v. City of Lakewood*, 911 P.2d 670, 672 (1995).

140. *Hill*, 120 S. Ct. at 2485.

141. *Id.*

142. *Id.* at 2486.

143. *Id.* at 2489.

144. *Id.* at 2489-90.

145. *Id.* at 2489 (quoting *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 772-73 (1994)).

146. *Id.* at 2491.

147. *Id.*



to meet the less stringent *Ward* standard. The fact that the law may have been enacted in response to the activities of anti-abortion protestors did not mean that the statute was content based since the statute on its face was not limited to those who oppose abortion.<sup>148</sup>

The Court applied the *Ward* analysis and found that the Colorado law was a valid "time, place, and manner regulation" because it served a significant government interest, it was content neutral, and it was narrowly tailored to serve those interests and left open ample alternative channels for communication.<sup>149</sup> In regard to the "narrow tailoring" requirement, the Court emphasized that in contrast to the injunction in *Schenck*, the statute here did not require a speaker to move away from anyone passing by.<sup>150</sup> Further, unlike the fifteen-foot zone in *Schenck*, an eight-foot zone allows a speaker to communicate at a "normal conversational distance." Finally, the statute contained a scienter requirement to protect speakers who inadvertently violate the statute.<sup>151</sup> The Court emphasized that under *Ward*, the government need not select the least intrusive means of serving the statutory goal and noted that "[a] bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, protect speech itself."<sup>152</sup> Finally, the Court noted that the restriction left ample room for communication because signs, pictures, and the human voice can clearly cross an eight-foot gap.<sup>153</sup>

The Court reasoned that the comprehensiveness of the statute was actually a virtue because it defeated any concerns of discriminatory governmental motives. Justice Stevens further emphasized that persons attempting to enter healthcare facilities are often in a particularly vulnerable physical and emotional state and that Colorado responded "by enacting an exceedingly modest restriction on the speakers' ability to approach."<sup>154</sup>

In a stinging dissent, Justice Scalia, joined by Justice Thomas, opined that the statute was clearly a speech regulation directed against the opponents of abortion. "[I]t blinks reality to regard this statute, in its application to oral communications, as anything other than a content-based restriction upon speech in the public forum. As such, it must survive that stringent mode of constitutional analysis our cases refer to as 'strict scrutiny.'"<sup>155</sup> He reasoned that whether a speaker needs permission to approach within eight feet depends entirely on what the speaker intends to say. Further, he argued that protecting people from unwelcome communication is not a compelling government interest.

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148. *See id.* at 2494.

149. *Id.* Note that the Court reintroduced the adjective "ample" despite post-*Ward* decisions suggesting that the test is met provided government can point to "reasonable alternative avenues of communication." *E.g.*, *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53 (1986).

150. *See Hill*, 120 S. Ct. at 2485.

151. *Id.* at 2495.

152. *Id.* at 2496.

153. *See id.*

154. *Id.* at 2496.

155. *Id.* at 2507 (Scalia, J., dissenting).



Indeed the state itself disavowed that interest.<sup>156</sup> Rather, Colorado contended that the law was passed in order to preserve “unimpeded access to health care facilities.”<sup>157</sup> As to that interest, Scalia argued that the eight-foot buffer zone was not narrowly tailored, but rather substantially burdened the plaintiffs’ ability to counsel and educate, something which cannot reasonably be done at an eight-foot distance.<sup>158</sup> The law, reasoned Scalia, thus cut off the most effective place for the speech, and the majority’s opinion was a “distortion of our traditional constitutional principles”—all done in the name of aggressively protecting abortion rights.<sup>159</sup>

Justice Kennedy agreed that the decision was an unprecedented departure from the Court’s teachings: “The result is a law more vague and overly broad than any criminal statute the Court has sustained as a permissible regulation of speech.”<sup>160</sup> Kennedy was most critical of the majority’s emphasis on the right of individuals to be protected from unwanted speech. Although the Supreme Court has recognized such a right in the privacy of one’s home or in a closed environment where one is a captive audience, generally the Court has refrained from extending this notion outside the sanctuary of the home.<sup>161</sup> The *Hill* case clearly demonstrates the internal conflict in First Amendment Doctrine, which requires that laws be drafted sufficiently broad so as to be viewed as content neutral and yet be narrowly tailored so as not to intrude unnecessarily on protected speech.

The Seventh Circuit followed the Supreme Court’s analysis in *Hill* in upholding an Indianapolis ordinance targeting street begging.<sup>162</sup> Although the Supreme Court has not directly resolved the constitutionality of laws that apply to this form of solicitation, appellate courts in the past have struck down city-wide bans on panhandling.<sup>163</sup> In *Gresham* the court addressed an Indianapolis ordinance that prohibited all “aggressive panhandling” and generally imposed time and place restrictions.<sup>164</sup> Specifically, panhandling was barred after dark and solicitation could not occur at bus stops, in public transportation vehicles or facilities, or within twenty feet of any ATM or bank entrance.<sup>165</sup> The ordinance imposed a civil penalty of up to \$2500 per violation. The parties assumed that the restriction was content neutral, even though violation of the ordinance

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156. *See id.* at 2058.

157. *Id.* at 2510.

158. *See id.* at 2511.

159. *Id.* at 2515.

160. *Id.* at 2519 (Kennedy, J., dissenting).

161. *See id.* at 2523-24.

162. *Gresham v. Peterson*, 225 F.3d 899 (7th Cir. 2000).

163. *See, e.g., Loper v. N.Y. City Police Dep’t*, 999 F.2d 699, 705 (2nd Cir. 1993) (finding that a prohibition on begging in all public places cannot meet the narrowly tailored test). *Compare Smith v. City of Ft. Lauderdale*, 177 F.3d 954, 956 (11th Cir. 1999) (upholding total ban on pan handling on a five-mile area of public beach).

164. *Gresham*, 225 F.3d at 901.

165. *See id.* at 901-02.



depended on whether a solicitor asked for cash rather than for something else.<sup>166</sup> Citing *Hill*, the court reasoned that “the inquiry into content neutrality . . . turns on the government’s justification for the regulation.”<sup>167</sup> Because the parties agreed that the regulations were content neutral, the court did not need to determine whether the law could be justified “without reference to the content of the regulated speech.”<sup>168</sup> Instead, it applied the *Ward* analysis.

The court first determined that the city had “a legitimate interest in promoting the safety and convenience of its citizens on public streets”<sup>169</sup>—an interest quite similar to that used to uphold the Colorado statute in *Hill*.<sup>170</sup> The court then ruled that the law was narrowly tailored, even though it totally banned nighttime verbal requests for funds.<sup>171</sup> Relying on *Ward*, the court reasoned that a government regulation will be considered narrowly tailored “so long as the . . . regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation.”<sup>172</sup> Because vocal requests for money can create a threatening environment which can be enhanced at night and in certain locations, and Indianapolis limited where request for funds could be made only to those certain times and places where citizens would feel most insecure, the city narrowed the application of the law in compliance with First Amendment doctrine.<sup>173</sup>

Finally, the court ruled that the ordinance leaves open ample alternative channels of communication because panhandlers can engage in their conduct during daylight hours and may solicit at night so long as they do not vocally request money.<sup>174</sup> The ordinance allowed beggars and other solicitors to passively stand or sit with a sign requesting money or to engage in street performances. “[T]hey may solicit in public places on all 396.4 square miles of the city, except those parts occupied by sidewalk cafes, banks, ATMs, and bus stops.”<sup>175</sup> Thus, the ordinance met all prongs of the *Ward* test.

The *Gresham* decision provides important guidance to other cities in the process of revitalizing their downtown areas in order to promote new family-friendly urban environments. Keeping streets safe for downtown visitors, especially at night, was a key goal of the *Gresham* statute, and Indianapolis’ ordinance may well serve as a model for other mayors. Significantly, the ordinance bans not only the poor and homeless from seeking contributions, but any solicitor. As in the *Hill* case, Indianapolis sought to draft its ordinance broadly enough to avoid the content neutrality problem and yet focused on those

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166. See *id.* at 905.

167. *Id.* at 905-06.

168. *Id.* at 906.

169. *Id.*

170. See *Hill v. Colorado*, 120 S. Ct. 2480, 2491 (2000).

171. *Gresham*, 225 F.3d at 906.

172. *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

173. See *id.*

174. See *id.* at 907.

175. *Id.*



times and places where panhandling creates the greatest threat, or at least the greatest nuisance, to other citizens.

### *B. Restrictions on Sexually Explicit Speech*

Despite the Court's concern for content-based regulations, it has recognized an exception where government seeks to regulate sexually explicit expression. For example, in *Barnes v. Glen Theatre, Inc.*,<sup>176</sup> the plurality held that the State of Indiana could regulate nude dancing, even if the ban on nudity made the erotic message less graphic.<sup>177</sup> However, because there was no majority opinion in *Barnes*, the status of such regulation remained uncertain. In *City of Erie v. Pap's A.M.*,<sup>178</sup> the Pennsylvania Supreme Court held that because the U.S. Supreme Court Justices failed to agree on any single rationale in *Barnes*, the Pennsylvania Supreme Court would reevaluate its own ban on nudity.<sup>179</sup> Ultimately, the lower court concluded that the ordinance was an impermissible content-based restriction on speech.<sup>180</sup> When the case was heard on appeal by the U.S. Supreme Court, the Court failed to reach a consensus as to its rationale, but nevertheless overturned the Pennsylvania ruling.<sup>181</sup>

Justice O'Connor wrote for only four Justices, but was joined by Justice Souter in her determination that this case be evaluated under the *O'Brien* test, which applies when the government seeks to regulate conduct that has an expressive element.<sup>182</sup> If the statutory ban on nudity is not aimed at suppressing expression, then the statute need only satisfy the less stringent *O'Brien* test, which requires the government prove only an important, rather than a compelling, interest in its regulation.<sup>183</sup> On its face, the ordinance in *City of Erie* banned all nudity regardless of whether accompanied by expressive activity; however, the preamble to the ordinance explained that, in part, its purpose was to limit "a recent increase in nude live entertainment."<sup>184</sup> From this statement of intent, the Pennsylvania Supreme Court erroneously found that a ban on this type of activity "necessarily has the purpose of suppressing the erotic message of the dance,"<sup>185</sup> even though it earlier held one of the goals of the ordinance was to combat the negative secondary effects of such nude expression.<sup>186</sup> The *City of Erie* plurality cautioned that judges should not seek out illicit motives.<sup>187</sup>

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176. 501 U.S. 560 (1991).

177. *See id.* at 572.

178. 529 U.S. 277 (2000).

179. *See id.* at 277-78.

180. *See id.* at 279-80.

181. *See id.* at 284.

182. *See id.* at 299.

183. *See id.* at 289.

184. *Id.* at 290.

185. *Id.* at 291-92.

186. *See id.* at 291.

187. *See id.* at 292.



Applying the *O'Brien* test, the plurality determined that the regulation furthered an important interest—"combating the harmful secondary effects associated with nude dancing."<sup>188</sup> The plurality reasoned that the city did not have to "conduct new studies or produce evidence independent of that already generated by other cities" regarding secondary effects so long as the studies relied on were "reasonably believed to be relevant to the problem" addressed.<sup>189</sup> In any event, the city also relied on its own findings that "lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety, and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and other serious criminal activity."<sup>190</sup> The plurality specifically rejected Justice Souter's opinion that would require Erie to develop a more specific evidentiary record supporting its ordinance, contrary to the position that Justice Souter took in *Barnes*.<sup>191</sup> Additionally, Justice O'Connor found that the ban on nude dancing would further the government interest in preventing the secondary effects.<sup>192</sup> She acknowledged that requiring dancers to wear pasties and G-strings "may not greatly reduce these secondary effects," but it sufficed that the regulation would further such interests.<sup>193</sup> Finally, Justice O'Connor found that the regulation was no more restrictive than necessary.<sup>194</sup> She described the requirement that dancers wear pasties and G-strings as a "minimal restriction in furtherance of the asserted government interests" that leaves "ample capacity to convey the dancer's erotic message."<sup>195</sup>

Justices Scalia and Thomas initially argued the issue before the Court was moot.<sup>196</sup> However, because they concurred in the judgment but disagreed with the analysis, they wrote separately. They argued that "a general law regulating conduct and not specifically directed at expression . . . is not subject to First Amendment scrutiny at all."<sup>197</sup> Even if the ordinance singled out nude dancing, there would be no First Amendment violation unless "it was the communicative character of [the] nude dancing that prompted the ban."<sup>198</sup>

Justice Souter argued in partial dissent that although the *O'Brien* analysis applied, the city had not presented evidence of any secondary effects so as to justify the law.<sup>199</sup> The city failed to present evidence of either the seriousness of the threatened harm or the efficacy of its remedy. He advocated remand to the

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188. *Id.* at 296.

189. *Id.* (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986)).

190. *Id.* at 297.

191. *See id.* at 299-300.

192. *See id.* at 300-01.

193. *Id.* at 301.

194. *See id.*

195. *Id.*

196. *See id.* at 302 (Scalia, J., concurring).

197. *Id.* at 307-08 (quoting *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572 (1991)).

198. *Id.* at 310.

199. *See id.* at 310-11 (Souter, J., dissenting in part).



state court to determine whether the ordinance was “reasonably designed to mitigate real harms.”<sup>200</sup>

Justices Stevens and Ginsburg argued in dissent that because of the ordinance’s censorial purpose, the test applied by the plurality and the level of the state interest necessary to satisfy that test were incorrect.<sup>201</sup> The ordinance operated as a total ban on protected expression, whereas the secondary effects analysis had been limited to cases involving only the location of adult entertainment establishments.<sup>202</sup> Justice Stevens noted that this was the first time a majority of the Supreme Court had held that secondary effects alone may justify total suppression of protected speech, rather than merely regulation of the location.<sup>203</sup>

Despite the lack of a majority opinion, five Justices (the Justice O’Connor plurality plus Justice Souter) in *City of Erie* agreed that the less stringent *O’Brien* analysis should apply to ordinances that restrict nude dancing.<sup>204</sup> Further, a

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200. *Id.* at 317.

201. *See id.* at 323 (Stevens, J., dissenting).

202. *See id.* at 317, 319.

203. *Id.* at 317-18.

204. *Cf. United States v. Playboy Entm’t Group, Inc.*, 120 S. Ct. 1878 (2000). There, a five Justice majority struck down section 505 of the Telecommunications Act of 1996, which required cable operators who provided channels “‘primarily dedicated to sexually-oriented programming’ either to ‘fully scramble or otherwise fully block’ those channels or to limit their transmission to hours when children are unlikely to be viewing,” i.e., between 10:00 p.m. and 6:00 p.m. *Id.* at 1882. Although the government argued that it was trying to shield children from “signal bleed,” this did not suffice to support the blanket ban because protection could have been obtained by a less restrictive alternative. *Id.* at 1888. Indeed, section 504 of the Act already required cable operators upon request of a cable service subscriber to, without charge, fully scramble or otherwise fully block any channel the subscriber did not wish to receive. Thus, cable systems already had the capacity to block unwanted channels on a household-by-household basis. This type of targeted blocking was less restrictive than a flat ban on speech. *See id.*

Further, there was little evidence as to how widespread or serious the problem of signal-bleeding really was. In sharp contrast to the analysis in *Pap’s A.M.*, the majority here maintained that “[t]he First Amendment requires a more careful assessment and characterization of an evil in order to justify a regulation as sweeping as this.” *Id.* at 1889. Even accepting the government’s argument that society has an independent interest aside from parents who may fail to act, the majority held the government’s interest was not sufficiently compelling to justify such a widespread restriction on speech. *Id.* at 1892-93.

Four dissenters stressed that since the law concerned only the regulation of “commercial actors who broadcast virtually 100% sexually explicit material,” the “narrow tailoring concerns seen in other cases” should not be a problem. *Id.* at 1900 (Breyer, J., dissenting). In short, the majority would require the government to use the technology that is the most effective and least restrictive of First Amendment freedoms, whereas the dissent would give greater deference in light of the less protected nature of the speech in question.

The need to protect children from pornography was also partially at issue in *American Amusement Machine Association v. Kendrick*, 115 F. Supp.2d 943 (S.D. Ind. 2000). In that case,



different majority (the plurality plus Justices Thomas and Scalia), agreed that government need not produce its own evidence demonstrating a problem with secondary effects or that its regulation will be effective in combating such secondary effects.<sup>205</sup> As to the latter, Justice Stevens commented in dissent: "To believe that the mandatory addition of pasties and a G-string will have *any* kind of noticeable impact on secondary effects requires nothing short of a titanic surrender to the implausible."<sup>206</sup> The majority's willingness to defer to the government, both as to its stated purpose and to its assessment of appropriate means, suggests that courts will be unlikely to interfere in legislative efforts to regulate adult entertainment establishments.<sup>207</sup> As the dissent laments, "the plurality opinion concludes that admittedly trivial advancement of a State's interests may provide the basis for censorship."<sup>208</sup>

### C. Freedom of Association

Although the First Amendment does not expressly protect freedom of association, the Supreme Court has long recognized that both freedom of intimate association and freedom of expressive association are protected by the Constitution.<sup>209</sup> In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,<sup>210</sup> the Court invoked the right to associate so that the Veteran's

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the court refused to enjoin, on First Amendment grounds, an Indianapolis ordinance restricting minors' access to video games containing "graphic violence" or "strong sexual content." *Id.* at 945-46. Although the Supreme Court has addressed the states' right to restrict children's access to pornography, it has not ruled on "graphic violence." The district court, however, saw no "principled constitutional difference between sexually explicit material and graphic violence, at least when it comes to providing such material to children." *Id.* at 946. Unlike the Telecommunications Act, the Indianapolis ordinance did not significantly limit adults' access to the material in question. The court, therefore, refused to preliminarily enjoin the statute's enforcement. *Id.* Subsequently, the video vendors appealed this decision to the Seventh Circuit.

205. See *City of Erie v. Pap's AM*, 529 U.S. 277, 296 (2000).

206. *Id.* at 323 (Stevens, J., dissenting) (emphasis added). See also *id.* at 321 n.4 (noting that no study has suggested that "the precise costume worn by the performers" is tied to secondary effects).

207. See, e.g., *Schultz v. City of Cumberland*, 228 F.3d 831, 847 (7th Cir. 2000) (finding that provisions of local ordinance that restrict hours of operation, ban full nudity, require inspection prior to licensing, etc., do not violate First Amendment; however, provision that restricted movements and gestures of the erotic dancer unconstitutionally burdened expression because it "deprives the performer of a repertoire of expressive elements with which to craft an erotic, sensual performance."); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000) (upholding mandatory closing hours for adult bookstores); *DCR, Inc. v. Pierce County*, 964 P.2d 380 (Wash. App. 1998), *cert. denied*, 529 U.S. 1053 (2000) (upholding regulation restricting the proximity between customers and dancers).

208. *Pap's AM*, 529 U.S. at 318 (Stevens, J., dissenting).

209. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

210. 515 U.S. 557 (1995).



Council would not have to allow the Gay, Lesbian and Bi-sexual Group of Boston to participate in their parade. The group sued under the Massachusetts public accommodations statute that prohibits discrimination based on sexual orientation.<sup>211</sup> The Supreme Court ruled that speakers have autonomy to choose the content of their own message.<sup>212</sup> However, the Court has rejected claims of the Jaycees that the forced admission of women into their organization unconstitutionally infringed on their First Amendment free association rights. In *Roberts v. United States Jaycees*,<sup>213</sup> the Court ruled that the State's purpose of eliminating gender discrimination was a compelling state interest and that the Jaycees had not demonstrated that the Act imposed any serious burdens on the male members' freedom of expressive association.<sup>214</sup>

In *Boy Scouts of America v. Dale*,<sup>215</sup> the Boy Scouts of America (BSA) asserted this same right to exclude persons who might infringe on the group's freedom of expressive association. The Boy Scouts were sued under a New Jersey public accommodation law after they revoked James Dale's adult membership in the organization.<sup>216</sup> Dale had been an "exemplary Scout" who eventually won approval as an assistant Scoutmaster.<sup>217</sup> When the organization learned that Dale was co-President of Rutgers University's Lesbian/Gay Alliance and that he had openly discussed the need for gay role models, it determined that he could no longer serve as an assistant scoutmaster.<sup>218</sup> The New Jersey Supreme Court rejected the Boy Scouts' First Amendment expressive association defense, finding that Dale's inclusion in the organization would not significantly affect the ability of members to carry out their purposes and that, in any event, "New Jersey [has] a compelling interest in eliminating the destructive consequences of discrimination."<sup>219</sup> The Supreme Court reversed in a 5-4 decision authored by Chief Justice Rehnquist. The majority reasoned that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."<sup>220</sup>

The Court initially determined that the BSA engages in expressive association because its core goal is to inculcate youth members with its value system.<sup>221</sup> The Court stressed that the group need not associate for the purpose of disseminating a particular message to be protected, nor must every member agree on the issue in order for the group's policy to be "expressive

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211. *See id.* at 561.

212. *See id.* at 573.

213. 468 U.S. 609 (1984).

214. *See id.* at 626.

215. 120 S. Ct. 2446 (2000).

216. *See id.* at 2449-50.

217. *Id.* at 2449.

218. *See id.*

219. *Id.* at 2450.

220. *Id.* at 2451 (citations omitted).

221. *See id.* at 2452.



association.”<sup>222</sup> In general, the organization should be the master of its own message, and the Court should defer “to an association’s assertions regarding the nature of its expression.”<sup>223</sup>

Having met this preliminary test, the Court then determined that forcing BSA to include Dale would significantly affect the organization’s ability to advocate certain view points. It found that homosexual conduct was inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms “morally straight” and “clean.”<sup>224</sup> In 1978, the organization issued a policy statement that homosexuality was inconsistent with its value system, and the Court found no reason to doubt that the Boy Scouts sincerely held this view.<sup>225</sup> The Court determined that requiring Dale to be reinstated as a leader would significantly burden the BSA’s expressive rights because Dale’s very presence as an assistant scoutmaster would force the Scouts to send a message that it accepted “homosexual conduct as a legitimate form of behavior.”<sup>226</sup> Although Dale had argued that the Court should apply a less stringent intermediate scrutiny, the majority relied on *Hurley* and determined that New Jersey’s interest, embodied in its public accommodation law, did not justify the significant burden imposed on the organization’s right to oppose or disfavor homosexual conduct.<sup>227</sup> In short, the Boy Scouts had a First Amendment right to exclude gay rights activists from its ranks.

Four dissenting Justices argued that the Boy Scout’s policy statements did not support its claim that New Jersey’s anti-discrimination law would impose any serious burdens on efforts to promote its values: “there is no indication of any shared goal of teaching that homosexuality is incompatible with being ‘morally straight’ and ‘clean’.”<sup>228</sup> Further, they argued that application of the state law would not force the Boy Scouts to communicate any message that it did not wish to endorse.<sup>229</sup> They attacked the majority for giving deference to the association regarding the nature of its expression and its view that Dale’s mere presence as a scoutmaster would impair its expression.<sup>230</sup> They opined that the majority’s highly deferential approach would convert the right of expressive association into a right to discriminate.<sup>231</sup>

In one sense, the Court’s decision is very limited since only New Jersey has extended its public accommodations laws to include the Boy Scouts. Further, no federal law forbids discrimination based on sexual orientation. Although the Supreme Court gives significant weight to the right to exclude others, thus far it

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222. *Id.* at 2455.

223. *Id.* at 2453.

224. *Id.* at 2452.

225. *See id.* at 2453.

226. *Id.* at 2454.

227. *See id.* at 2457.

228. *Id.* at 2465 (Stevens J., dissenting).

229. *See id.* at 2460.

230. *See id.*

231. *See id.* at 2471.



has respected this expressive association right only in the context of permitting discrimination against gays. This is evident when one compares the Court's decisions in *Dale* and *Hurley* with *Jaycees*, as well as with *Board of Directors of Rotary International v. Rotary Club of Duarte*,<sup>232</sup> where it rejected the right of the Rotary Clubs to exclude women after finding that their admission into the organization would not significantly affect the "existing members' ability to carry out their various purposes."<sup>233</sup> Arguably, in the context of gender or race-bias, the state's compelling interest in prohibiting these forms of discrimination could trump any freedom of expressive association claim.

Related to the right not to associate is the right not to speak or to subsidize speech. In *Abood v. Detroit Board of Education*,<sup>234</sup> the Court held that teachers could not be forced to pay dues to subsidize a union's political activity. Similarly, in *Keller v. State Bar of California*,<sup>235</sup> the Court held that attorneys could not be forced to subsidize mandatory state bars to the extent that the money supported causes other than self policing or improving the profession.

The question raised in *Board of Regents of University of Wisconsin System v. Southworth*,<sup>236</sup> was whether the aforementioned case precedent could be invoked by Christian Law Students at the University of Wisconsin who challenged mandatory student fees that they alleged primarily supported left-leaning activists. The Justices unanimously rejected the students' claim that they were required to endorse any ideas.<sup>237</sup> The Court explained that the student activity fees were used to support various campus services and extra-curricular student activities and that any group could obtain funding without regard to its views.<sup>238</sup> Resolving disagreement among the circuits, Justice Kennedy stressed that the case did not involve the University's right to use its own funds to advance its own or any particular message; rather, the money went into a pool from which an array of campus groups could draw support.<sup>239</sup> Although the Court recognized that students cannot be required to pay subsidies for speech of other students without some First Amendment protection, it nonetheless determined that the viewpoint neutrality requirement of the University program (it was stipulated that applications for funding were treated in a viewpoint-neutral way) was sufficient to protect the rights of the objecting students.<sup>240</sup> Unlike bar associations or labor union members, students were not paying activity fees to subsidize a single viewpoint. The Court reasoned that it was inevitable that subsidies would go toward speech that some students found objectionable or

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232. 481 U.S. 537 (1987).

233. *Id.* at 548.

234. 431 U.S. 207 (1977).

235. 496 U.S. 1 (1990).

236. 120 S. Ct. 1346 (2000).

237. *See id.* at 1350.

238. *See id.* at 1350-51.

239. *See id.* at 1354.

240. *See id.*



offensive to their personal beliefs.<sup>241</sup> If each student could list those causes that he or she would or would not support, the University's mission in exposing students to a wide range of discussion on philosophical, religious, scientific, social, and political subjects would be thwarted.<sup>242</sup> However, the Court found that one aspect of the program might violate the viewpoint neutrality requirement, namely the student referendum provision, which appeared to permit funding or defunding by majority vote of the student body.<sup>243</sup> The key feature distinguishing this case from *Keller* and *Abood* was that the University itself was not the speaker and the student fees were used to support a wide array of viewpoints. If, by majority vote of the student body, a particular group may be funded or defunded, the viewpoint neutrality principle that is central to the Court's First Amendment jurisprudence would be violated.<sup>244</sup>

## V. THE ESTABLISHMENT CLAUSE

The most frequently litigated cases under the Establishment Clause involve aid to parochial education and prayer in public schools. Both of these issues were addressed by the United States Supreme Court this Term. Locally, federal courts addressed the question of whether government may display religious symbols, such as the Ten Commandments, in public places.

### A. Aid to Parochial Education

One of the most controversial and recurring constitutional issues raised under the Establishment Clause is whether parochial education may be funded by taxpayer dollars. The Supreme Court reopened the debate in a 1997 decision, *Agostini v. Felton*,<sup>245</sup> when it overturned earlier restrictive decisions and held that it was permissible for the federal government to fund remedial instruction and counseling for disadvantaged students in parochial schools.<sup>246</sup> The Court emphasized that providing this remedial education, pursuant to Title I of the 1965 Elementary and Secondary Education Act,<sup>247</sup> would neither supplant the cost of regular education nor create a financial incentive to undertake religious education.<sup>248</sup>

This Term, in *Mitchell v. Helms*,<sup>249</sup> the Court addressed another provision of Title I, Chapter 2 of the Education Consolidation and Improvement Act of 1981,<sup>250</sup> which channels federal funds to state and local education agencies for

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241. See *id.* at 1355.

242. See *id.* at 1355-56.

243. See *id.* at 1357.

244. See *id.*

245. 521 U.S. 203 (1997).

246. See *id.* at 229.

247. 20 U.S.C. §§ 6301-8962 (1994 & Supp. III 1997).

248. See *Agostini*, 521 U.S. at 229.

249. 120 S. Ct. 2530 (2000).

250. 20 U.S.C. §§ 7301-7373 (2000).



the purchase of educational materials and equipment.<sup>251</sup> Under the Act, state-owned instructional equipment, including computers and software, is loaned to public and private elementary and secondary schools. The statute requires that materials provided to private schools be "secular, neutral, and nonideological."<sup>252</sup> The Fifth Circuit ruled, nonetheless, that such assistance violated the Establishment Clause because the equipment could readily be used to advance the sectarian mission of the schools.<sup>253</sup>

In recent years, several Justices have vociferously argued that the Court's strict separationist approach to church-state relations should be replaced by a more "accommodationist" approach. Under the standards used in the 1970s, the United States Supreme Court invalidated most forms of direct assistance to parochial schools, other than textbooks.<sup>254</sup> In *Lemon v. Kurtzman*<sup>255</sup> the Court ruled that any government program must have a secular purpose, an effect that neither advances nor inhibits religion, and does not foster "an excessive government entanglement with religion."<sup>256</sup> The Court strictly applied these three prongs and frequently found that if aid was given to schools without any limitations to ensure that only secular interests were advanced, there would be a violation of the Establishment Clause. On the other hand, where funds were closely supervised to ensure they would not be used to advance religion, the Court found such aid violated the entanglement prong. In a splintered 4-2-3 decision, the United States Supreme Court in *Mitchell* upheld this law, even though thirty percent of the Chapter 2 funds spent in Jefferson Parish, Louisiana, were allocated to private schools, most of which are Catholic.<sup>257</sup>

Applying the analysis set forth in *Agostini*, six Justices agreed that the primary effect of the Act was not to advance religion, and thus the aid program did not violate the Establishment Clause.<sup>258</sup> They also agreed to overrule two earlier Supreme Court cases holding that programs which provided the same types of materials and equipment as Chapter 2 were unconstitutional, reasoning that these decisions had created an unworkable, inconsistent jurisprudence in school aid cases.<sup>259</sup> Under the *Agostini* framework, the Court looked to whether a statute "has a secular purpose" and a "primary effect" that neither advances nor inhibits religion.<sup>260</sup> Government aid is disallowed under this standard only if it results in governmental indoctrination, define[s] its recipients by reference to

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251. See *id.* § 7351(b)(2).

252. *Id.* § 7372(a)(1).

253. See *Helms v. Picard*, 151 F.3d 347 (5th Cir. 1998), *rev'd sub nom. Mitchell v. Helms*, 530 U.S. 793 (2000).

254. See *Meek v. Pittenger*, 421 U.S. 349 (1975).

255. 403 U.S. 602 (1971).

256. *Id.* at 613 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

257. See *Mitchell*, 120 S. Ct. at 2538.

258. See *id.* at 2540, 2555-56.

259. See *id.*

260. See *id.* at 2540 (citing *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997)).



religion, or create[s] an excessive entanglement.”<sup>261</sup> The absence of excessive entanglement was not disputed; therefore, the plurality focused on the indoctrination question and concluded that the aid here was permissible because it “is offered to a broad range of groups or persons without regard to their religion.”<sup>262</sup> Further, the program determined eligibility for aid neutrally and allocated aid based on the private choices of parents.<sup>263</sup>

As to the second criterion under *Agostini*, the program again passed constitutional muster because it did not define recipients by reference to religion.<sup>264</sup> Here the focus was on whether the criteria for allocating aid creates a financial incentive to undertake religious indoctrination, which was absent here.<sup>265</sup> Justice Thomas reasoned that even direct aid did not impermissibly support religion provided it was neutrally available and passed through the hands of private citizens who made private choices as to the aid.<sup>266</sup> The plurality also rejected the argument that public aid to sectarian schools is permissible only when it cannot be diverted to religious use: “The issue is not divertibility of aid but rather whether the aid itself has an impermissible content.”<sup>267</sup> Finally, Justice Thomas declared that neither the fact that a program generates “political divisiveness” nor that the recipient is “pervasively sectarian” is constitutionally relevant, and he attacked the dissent’s use of a multiplicity of standards that created a “perverse chaos” in this area of the law.<sup>268</sup>

Although a majority of the Court agreed that this program was constitutional, Justice Thomas’ attempt to further restrict the Establishment Clause to permit the inclusion of sectarian schools in otherwise “neutral” aid programs did not win the votes of either Justice O’Connor or Justice Breyer. In a separate concurrence, Justice O’Connor contested the “unprecedented breadth” of the plurality’s test for evaluating Establishment Clause challenges to government school-aid programs.<sup>269</sup> Although she agreed that neutrality is an important criterion for upholding government-aid programs, she wrote that the Court has “never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid.”<sup>270</sup> Justice O’Connor also disagreed with Justice Thomas’ abandonment of the distinction between direct and indirect aid.<sup>271</sup> Justice O’Connor emphasized several features of the Chapter 2 program that in her view justified upholding the Act. First, the Act required state and local agencies to distribute funds “only to supplement the

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261. *Id.* at 2540.

262. *Id.* at 2541.

263. *See id.* at 2541-42.

264. *See id.* at 2552.

265. *See id.* at 2553-54.

266. *See id.*

267. *Id.* at 2548.

268. *Id.* at 2550.

269. *Id.* at 2556 (O’Connor, J., concurring).

270. *Id.* at 2557 (emphasis in original).

271. *See id.* at 2556.



funds otherwise available to a religious school" and it expressly prohibited the use of such funds to supplant funds from non-federal sources.<sup>272</sup> Second, no dollars ever reached the coffers of a religious school and the statute specifically provided that the public agency retained title to the materials and equipment, thus ensuring that "religious schools reap no financial benefit by virtue of receiving loans of materials and equipment."<sup>273</sup> Third, all materials had to be "secular, neutral, and nonideological."<sup>274</sup> Justice O'Connor complained that the plurality opinion "foreshadows the approval of direct monetary subsidies to religious organizations, even when they use the money to advance their religious objectives."<sup>275</sup> Joining her concern, Justice Souter, writing for three dissenters, lamented that the plurality's "evenhandedness neutrality" test would in essence end "the principle of no aid to the schools' religious mission."<sup>276</sup>

Lurking in the background is the controversial question of whether parochial education may be funded by government vouchers issued to parents to pay tuition at the school of their choice. In 1998, the Supreme Court denied certiorari in the case of *Jackson v. Benson*,<sup>277</sup> leaving intact the Wisconsin Supreme Court ruling that such voucher systems are constitutional, at least where eligibility criteria are religion neutral.<sup>278</sup> On the other hand, state and federal courts in Vermont, Maine, Ohio, and Puerto Rico have invalidated voucher programs.<sup>279</sup> Justice O'Connor's reluctance to join the plurality opinion and her decision favoring a highly nuanced, case-by-case assessment of aid to parochial education, leaves the constitutionality of such voucher systems in doubt.<sup>280</sup> Unlike the aid involved in *Mitchell*, voucher schemes do supplant the cost of regular education, in that dollars actually flow into the coffers of religious schools, and voucher checks are signed over to the schools by parents without any restrictions as to how the funds will be expended.

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272. *Id.* at 2562.

273. *Id.*

274. *Id.* Although Justice O'Connor acknowledged that there was some evidence that aid had been diverted to religious instruction, she concluded that it was "*de minimis*." *Id.* at 2570.

275. *Id.* at 2560.

276. *Id.* at 2596 (Souter, J., dissenting).

277. 578 N.W.2d 602 (Wis.), *cert. denied*, 525 U.S. 997 (1998).

278. *See id.* at 632.

279. *See Bagley v. Raymond Sch. Dep't*, 728 A.2d 127 (Me.), *cert. denied*, 528 U.S. 947 (1999); *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539 (Vt.), *cert. denied*, 528 U.S. 1066 (1999); *Asociacion de Maestros de P.R. v. Torres*, No. AC-94-371, AC-94-326, 1994 WL 780744 (P.R. Nov. 30, 1994).

280. In *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000), the court relied on Justice O'Connor's concurring opinion in *Mitchell* to support the view that neutrality alone is not sufficient to avoid an Establishment Clause problem. *See id.* at 959. The court ruled that Ohio's school voucher system which put no restraint on the school's use of tuition and whose tuition cap effectively channeled the overwhelming majority of participants to religious schools with lower tuition, had the primary effect of advancing religion and endorsing sectarian education in violation of the Establishment Clause. *See id.* at 963.



### *B. Prayer in Public Schools*

Since the 1960's, the Supreme Court has closely adhered to the principle that prayer in public schools is prohibited by the Establishment Clause. This rule applies regardless of whether school officials or students deliver the prayer or whether the prayer ceremony is voluntary. In *Lee v. Weisman*,<sup>281</sup> the Court reaffirmed, in a 5-4 decision, the prohibition on government-sponsored prayer and held that the Establishment Clause also outlaws the practice of public schools inviting clergy to deliver non-sectarian prayers at graduation ceremonies. Justice Kennedy reasoned that graduation prayers "bore the imprint of the State and thus put school-age children who objected in an untenable position."<sup>282</sup> He emphasized the "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."<sup>283</sup>

Since *Lee*, many school districts have tried to avoid its impact by adopting policies that appear to leave the question of school prayer up to individual students. The Santa Fe Independent School District in Texas was notorious for engaging in blatant "proselytizing practices, such as promoting attendance at a Baptist revival meeting, encouraging membership in religious clubs, chastising children who held minority religious beliefs, and distributing Gideon Bibles on school premises."<sup>284</sup> In addition, student "chaplains" were allowed "to read Christian invocations and benedictions . . . at graduation ceremonies, and to deliver overtly Christian prayers over the public address system at home football games."<sup>285</sup> After a law suit was filed, the school district adopted a new policy, entitled "Prayer At Football Games," which sought to insulate its practice at athletic events.<sup>286</sup> The policy authorized a student referendum to determine first whether "invocations" should be delivered at games and then to select the speaker.<sup>287</sup>

In a 6-3 decision, the Court ruled that the District's policy permitting student-led, student-initiated prayer at football games violated the Establishment Clause.<sup>288</sup> The Court reiterated the principle stated in *Lee* that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise."<sup>289</sup> The Court rejected the argument that there was no coercion because the messages were private student speech, noting that the invocations were in fact "authorized by a government policy and [took]

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281. 505 U.S. 577 (1992).

282. *Id.* at 590.

283. *Id.* at 592.

284. *Sante Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266, 2271 (2000).

285. *Id.* at 2271-72 (footnote omitted).

286. *Id.* at 2273.

287. *Id.*

288. *See id.* at 2275.

289. *Id.* (citing *Lee v. Weisman*, 505 U.S. 577, 587 (1992)).



place on government property at government-sponsored school-related events."<sup>290</sup> The student referendum did not insulate the practice from constitutional challenge because "fundamental rights may not be submitted to vote; they depend on the outcome of no elections."<sup>291</sup>

More significantly, the District had not separated itself from the religious content because the policy involved both perceived and government's actual endorsement of religion:

Even though the particular words used by the speaker are not determined by those votes, the policy mandates that the "statement or vocation" be "consistent with the goals and purposes of this policy," which are "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition."<sup>292</sup>

The Court reasoned that this invites and encourages religious messages because prayer "is the most obvious method of solemnizing an event."<sup>293</sup> Further, "the students understood that the central question before them was whether prayer should be a part of the pregame ceremony."<sup>294</sup> In light of the text as well as the history of this policy, Justice Stevens concluded that "members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration"<sup>295</sup> and that "an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval."<sup>296</sup>

In addition to finding impermissible endorsement, the Court also found unconstitutional coercion, as it had in *Lee*. Even though the pregame messages were the product of a student election and attendance at extracurricular events was voluntary, the Court nonetheless concluded that students should not be forced to choose between attending games or facing a personally offensive religious ritual: "The constitutional command will not permit the District 'to exact religious conformity from a student as the price' of joining her classmates at a varsity football game."<sup>297</sup> Further, the whole election mechanism encouraged divisiveness along religious lines in a public school setting, contrary to one of the key goals of the Establishment Clause, which is to remove such debate from governmental supervision or control.<sup>298</sup> The mere fact that government bestows this power on students is itself unacceptable.<sup>299</sup>

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290. *Id.*

291. *Id.* at 2276 (citing *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

292. *Id.* at 2277.

293. *Id.*

294. *Id.* at 2278.

295. *Id.*

296. *Id.*

297. *Id.* at 2280-81.

298. *See id.* at 2283.

299. *See id.* at 2280.



In a stinging dissent, Justice Rehnquist argued that the majority opinion "bristles with hostility to all things religious in public life."<sup>300</sup> He lamented that the majority applied the most rigid, separationist interpretation of the Establishment Clause, and contended that the Court should have deferred to the District's expression of a plausible secular purpose for the enactment.<sup>301</sup>

The Court's decision will affect lower court rulings addressing the policy of allowing high school students to vote on whether their graduation ceremonies should include unrestricted student messages, which may include prayer. The decision in *Santa Fe* suggests that issues regarding prayer should not be submitted to majority vote by the student body. However, the particular background of this Texas community, with its long history of school involvement in religion, may provide a basis for distinguishing future cases.<sup>302</sup> Arguably, the divisiveness along religious lines encouraged by a majoritarian approach to school prayer is equally offensive at a graduation ceremony or a football game. On the other hand, the need to solemnize a football game appears less plausible. As the lower court ruled, football games are "hardly the sober type of annual event that can be appropriately solemnized with prayer."<sup>303</sup> At minimum, the decision means that a school district cannot implicitly favor prayer even pursuant to a referendum determined by majority student vote. The question remains, however, as to whether a truly neutral referendum, without the historical backdrop of the Santa Fe District, where government retains no control over the content of the student's speech, would pass constitutional muster. If truly "private" speech is advancing religion, there is no Establishment Clause problem and, indeed, the Free Speech Clause would then protect the expressive rights of the individual.<sup>304</sup>

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300. *Id.* at 2283 (Rehnquist, C.J., dissenting).

301. *See id.* at 2286.

302. *See, e.g.,* *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070 (11th Cir.), *vacated and remanded*, 121 S. Ct. 31 (2000) (originally holding public school district's policy of allowing high school students to vote on whether their graduation ceremonies will include unrestricted student messages, which may include prayer, does not violate the Establishment Clause).

303. *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 823 (5th Cir. 1999).

304. *See* *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 822-23 (1995) (finding university violated students' First Amendment rights when it refused to subsidize a student-run newspaper published with a religious viewpoint); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 757-59 (1995) (holding that the State violated the Klan's First Amendment rights when it prohibited it from displaying a cross on Capitol Square, a traditional open, public forum); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387-88 (1993) (holding that school that opened its grounds after school hours to social and political organizations could not deny access to a religious group that wished to display films promoting a Christian perspective on family values). *Cf. Good News Club v. Milford Cent. Sch.*, 202 F.3d 502, 504 (2d Cir.), *cert. granted*, 121 S. Ct. 296 (2000) (holding that school district could deny religious club access to school facilities after hours where the speech involved religious prayer and instruction rather than simply discussion of morals from a religious viewpoint).



### C. Government Display of the Ten Commandments

In *Stone v. Graham*,<sup>305</sup> the Supreme Court held that Kentucky legislation requiring the posting of the Ten Commandments in the back of every classroom was unconstitutional because it had no valid purpose. Although small print at the bottom of the display stated that “[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States,” the Supreme Court said the purpose was “plainly religious in nature,” because the Ten Commandments is “undeniably a sacred text in the Jewish and Christian faiths.”<sup>306</sup> The Court indicated that some displays of the Ten Commandments might pass constitutional muster, but here the State made no attempt to mitigate the religious nature of the display.<sup>307</sup> Since *Graham*, the Supreme Court has somewhat tempered its approach to government display of religious symbols. The Court continues to examine the purpose to determine whether it is a sham, but later decisions suggest that the Court is not as apt to question the legitimacy of a stated government reason.<sup>308</sup> Even if the purpose is secular, however, the current test also asks whether the effect of the display is to convey a message of government endorsement of religion.<sup>309</sup>

Two federal District courts in Indiana applied this test, which examines purpose and effect, and reached diametrically opposed conclusions regarding government display of the Ten Commandments. In *Books v. City of Elkhart*,<sup>310</sup> Judge Sharp ruled that display of the Ten Commandments near the entrance of City Hall in Elkhart had a secular purpose, namely to “[promote] morality among [the city’s] youth . . . a legitimate aim of government and traditionally part of the police powers of the state.”<sup>311</sup> The City had accepted the monument from the Fraternal Order of Eagles (FOE) in 1958 as part of its National Youth Guidance Program.<sup>312</sup>

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305. 449 U.S. 39 (1980).

306. *Id.* at 41.

307. *See id.* at 41-42.

308. *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266, 2286 (2000) (Rehnquist, J., dissenting).

309. *See, e.g., Capitol Square Review*, 515 U.S. at 753. In *Freedom from Religion Foundation, Inc. v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000), the court ruled that display of a fifteen-foot statue of Jesus Christ on a parcel of land, once part of a public park, next to the main highway violated the Establishment Clause even though the city sold the parcel to a private group. The court determined that the display still impermissibly conveyed a message of government endorsement. *See id.* at 495-96.

310. 79 F. Supp. 2d 979 (N.D. Ind. 1999), *rev'd*, 235 F.3d 292 (7th Cir. 2000).

311. *Id.* at 996.

312. *See id.* at 982. The District Court followed the reasoning of the Colorado Supreme Court in *State v. The Freedom from Religion Foundation, Inc.*, 898 P.2d 1013 (Colo. 1995), which found a secular purpose for the State’s display of an identical FOE Ten Commandments Monument in the state park adjacent to the state capital building. *See Books*, 79 F. Supp. 2d at 995. *Cf. Doe v.*



Having met the secular purpose test, the court proceeded to find that the effect of the display was not the impermissible endorsement of religion. Even though the monument was shaped in the form of two large, stone tablets and was located on a grass lawn near the entrance to a municipal building, the court noted that other historical monuments were also maintained by the City.<sup>313</sup> It reasoned that the monument was not "obtrusive" and thus was constitutional in this context.<sup>314</sup> Following Supreme Court guidance, the district court judge looked to content, context, and location of the display to determine whether a reasonable observer might think the City was endorsing religion.<sup>315</sup> He noted that the monument itself contained a myriad of religious symbols, including an "all-seeing eye" inside of a pyramid, which had both religious and secular meaning, two Jewish symbols, and a symbol representing Christ that was used in the early Catholic Church.<sup>316</sup> In addition, it contained an eagle and a flag, both generally accepted as patriotic symbols, and an inscription at the bottom stating that it was donated by the Fraternal Order of the Eagles.<sup>317</sup> Further, on the other side of the sidewalk stood a Revolutionary War Monument donated by the Daughters of the American Revolution and a Freedom Monument, collectively referred to as the War Memorial.<sup>318</sup> Although the court conceded that "the text of the Ten Commandments dominated the monument," it nonetheless concluded that the message could not be regarded as "exclusively religious."<sup>319</sup> More significantly, the court stated that, "[l]ocal municipalities should be granted some latitude by the federal courts in how they arrange artistic displays in the space they have available."<sup>320</sup> In short, the court determined that it is not an unconstitutional endorsement of religion for the City to acknowledge the importance of the Ten Commandments in the legal and moral development of our country by displaying the Monument on the lawn of the Municipal Building.<sup>321</sup>

After the decision in *Books*, the Indiana General Assembly adopted House Bill 1180, which authorizes the display of the Ten Commandments on real property owned by the state or a political subdivision as part of an exhibit

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Harlan County Sch. Dist., 96 F. Supp. 2d 667 (E.D. Ky. 2000) (finding that the display of the Ten Commandments on public grounds lacks a secular purpose and thus is unconstitutional in public schools); *ACLU of Ky. v. Pulaski County*, 96 F. Supp. 2d 691 (E.D. Ky. 2000) (finding that the display of the Ten Commandments on public grounds lacks a secular purpose and thus is unconstitutional in courthouse). The Kentucky courts ruled that defendants' attempt to flank the commandments with other documents in the face of litigation did not eliminate the constitutional problem. See *ACLU of Ky.*, 96 F. Supp. 2d at 693 n.1.

313. See *Books*, 79 F. Supp. 2d at 984.

314. *Id.* at 1002.

315. See *id.*

316. *Id.*

317. See *id.*

318. See *id.* at 984.

319. *Id.* at 1002.

320. *Id.*

321. See *id.* at 1002-03.



displaying other documents of historical significance that formed and influenced the United States legal or governmental system.<sup>322</sup> The Act took effect on July 1, 2000, and the Governor of Indiana announced his intent to put up a limestone monument of the Ten Commandments on the State House lawn. The Indiana Civil Liberties Union immediately filed suit to block display of the monument. In *Indiana Civil Liberties Union, Inc. v. O'Bannon*,<sup>323</sup> Judge Barker granted plaintiffs' motion for a preliminary injunction to prevent the state from proceeding to erect this proposed monument, which was being donated by the Indiana Limestone Institute. In order to comply with the state statute, the monument was to contain not only the Ten Commandments, but also the Preamble of the 1851 Indiana Constitution and the federal Bill of Rights. The Monument was designed as a four-sided structure approximately seven feet high, composed of two large blocks of Indiana limestone weighing almost 11,500 pounds. It was to be erected where a former Ten Commandments monument stood which, like the one in Elkhart, was donated by the Fraternal Order of the Eagles.<sup>324</sup>

Addressing the purpose prong, the court determined that the State, at oral argument, had not shown that the display was to serve only as a reminder of the nation's core values and ideals. The State could not cite any historical link between most of the commandments and "ideals animating American government."<sup>325</sup> Judge Barker distinguished *Books*, where the stated purpose was to provide a code of conduct for youngsters. She stated that the design of the monument as well as its words belied any secular purpose.<sup>326</sup> The Ten Commandments would be displayed on one side of the monument, not physically linked to the other text on the display, nor was there any indication on the monument that the commandments were being displayed for their historical significance.<sup>327</sup>

Although recognizing that impermissible religious purpose alone would suffice to justify the injunction, the court proceeded to address the effects prong, examining, as Judge Sharp had, the content of the message, its context, and its location.<sup>328</sup> Judge Barker concluded that "a reasonable person would perceive in this display a message of government endorsement of religion."<sup>329</sup> The text of the Ten Commandments was prominently located on one side of the seven-foot tall monument and a person would have to walk completely around it to read the other messages. Further, the lettering of the Ten Commandments was significantly larger than that of the other documents and thus a viewer would see

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322. See IND. CODE § 4-20.5-21-2 (2000).

323. 110 F. Supp. 2d 842 (S.D. Ind. 2000).

324. See *id.* at 844.

325. *Id.* at 851.

326. See *id.* at 852.

327. See *id.*

328. See *id.* at 853.

329. *Id.* at 858.



this as the most prominent message being displayed.<sup>330</sup> In addition, the Monument was located on the lawn of the Statehouse at the seat of government for the entire State.<sup>331</sup> Finally, the court noted that this was a permanent display, unlike the seasonal displays upheld by the Supreme Court in earlier cases.<sup>332</sup> The Court expressed disagreement with the conclusion in *Books* that displaying the Ten Commandments near the seat of government does not convey the government's stamp of approval. "[W]e say respectfully that we likely would not share that assessment."<sup>333</sup>

Both decisions were appealed to the Seventh Circuit. In December, 2000, the court overturned Judge Sharp's ruling in *Books* and found that the Ten Commandments display in front of the Municipal Building in Elkhart violated the Establishment Clause.<sup>334</sup> Judge Ripple applied the "endorsement" test and determined that the display had both the purpose and the effect of impermissibly endorsing religion. As to purpose, he relied on the Supreme Court's decision in *Stone*<sup>335</sup> and found that the Ten Commandments is clearly a religious document and that the record did not disclose any serious attempt by the City to present the text in a way that might diminish its religious character.<sup>336</sup> At the initial dedication of the monument in 1958, the speakers included a minister, a priest, and a rabbi, who generally urged the people of Elkhart to embrace the "religious code of conduct taught in the Ten Commandments."<sup>337</sup> Although the city in 1999 passed a Resolution proclaiming a secular purpose—to recognize the historical and cultural significance of the Ten Commandments—Judge Ripple concluded that even if entitled to some deference, the fact that the Resolution was issued on the eve of litigation negated its sincerity.<sup>338</sup>

In addition, Judge Ripple found that the display had the principle effect of advancing religion. He admonished that religious displays at the seat of government should be subjected to particularly careful scrutiny, and, in addition, the monument was a permanent fixture, not a mere seasonal display.<sup>339</sup> The monument could not be characterized as simply a component of a comprehensive display of the cultural heritage of the people of Elkhart; rather, it stood "as a sole and stark reminder of the specific injunctions contained in the

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330. *See id.* at 857.

331. *See id.* Subsequently Judge Barker ruled in *Kimbley v. Lawrence County*, 119 F. Supp. 2d 856, 873 (S.D. Ind. 2000) that placing the same monument at the county courthouse raised similar constitutional problems and thus she preliminarily enjoined placement of the monument at this new site.

332. *See O'Bannon*, 110 F. Supp. 2d at 858.

333. *Id.*

334. *Books v. City of Elkhart*, 235 F.3d 292, 294 (7th Cir. 2000), *cert. denied*, No. 00-1407, 2001 U.S. LEXIS 4120, at \*1 (May 29, 2001).

335. *Stone v. Graham*, 449 U.S. 39, 101 (1980).

336. *See Books*, 235 F.3d at 302-03.

337. *Id.* at 303.

338. *See id.* at 304.

339. *See id.* at 305-06.



Commandments.”<sup>340</sup> Finally, he concluded that the average person approaching the seat of government would perceive this as government endorsing religion.<sup>341</sup>

Interestingly, as to remedy, the court hesitated to mandate immediate removal. Instead, Judge Ripple cautioned that Elkhart authorities should have “a reasonable time to address in a responsible and appropriate manner the task of conforming to the letter and spirit of the constitutional mandate.”<sup>342</sup>

Judge Ripple’s analysis raises several difficult questions. First, is the secular purpose to be decided at the time a monument is first erected or when it is challenged? Second, how closely should courts examine purpose to ascertain whether such is “sham” or “sincere,” especially when the secular interest is not advanced until litigation has been commenced? Third, if one purpose is religious, but there are valid secular reasons as well, should the court sustain such a display? Finally, to what extent can the religious message be tempered and thus Establishment Clause problems allayed by surrounding a religious symbol by secular objects?

In a lengthy dissent, Judge Manion rejected Judge Ripple’s answers to all of these questions. He argued that the city’s resolution was not a sham and that the timing was totally reasonable since it was not until 1999 that a demand was made to remove the monument.<sup>343</sup> Further, he stated that even if the city had a religious purpose in displaying the Ten Commandments, the fact that it presented several secular justifications should avoid a constitutional problem. Indeed, the City originally accepted the Ten Commandments from the Eagles “in order to further the Eagles’ goal of providing ‘youths with a common code of conduct that they could use to govern their actions.’”<sup>344</sup> Further, the dissent contended that the primary effect was not to advance religion but rather this case, like *Allegheny*, involved a monument of the Ten Commandments as part of a larger historical and cultural display. “[T]he Ten Commandments monument is not given special placement by the City . . . [r]ather [it] is one of multiple monuments closely placed in the available, yet small walkway leading into the municipal building.”<sup>345</sup> The monument also included secular objects, including the flag, the eagle, and the all-seeing eye, and it was surrounded by two other monuments. Thus, a reasonable citizen would not believe that Elkhart was endorsing religion, which is why, the dissent opines, no one challenged its existence during the forty years it stood outside the Municipal Building.<sup>346</sup> Finally, Judge Manion complained that there can be no remedy other than removal because of the court’s determination that the display lacks a secular purpose.<sup>347</sup> Thus, no matter what the city did to dilute the religious aspects of the display, the absence of a

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340. *Id.* at 306.

341. *See id.* at 306-07.

342. *Id.* at 307-08.

343. *See id.* at 313-14 (Manion, J., concurring in part and dissenting in part).

344. *Id.* at 315.

345. *Id.* at 319.

346. *See id.* at 320-21.

347. *See id.* at 325-26.



secular purpose alone would require that the monument be removed. Because the debate in Indiana is part of a nationwide push to display the Ten Commandments in public venues, it is likely that the controversy will ultimately be settled by the Supreme Court.





# CONSUMER TRANSACTIONS: MOVEMENT TOWARD A MORE PROGRESSIVE APPROACH

JAMES P. NEHF\*

As a general observation, the preceding year was not particularly good for consumers in the Indiana legislature and courts. While consumers scored a few victories in individual lawsuits, they were of minor importance to the legal community at large. Indiana continues to be a state in which consumer rights are not aggressively protected by statute or court decisions when compared with the progressive consumer movements in other states.

Nevertheless, the state witnessed a few important consumer developments in the last year. Several court decisions are worth noting not only for their resolution and application of substantive legal issues, but also as a study of how judges interpret consumer statutes and contracts, whether they look to the language of the text alone or extend the inquiry to other contextual factors. There were some significant legislative and regulatory developments as well. This Article highlights selected developments in five areas: (1) sales of goods and services to consumers, (2) debt collection practices, (3) short term or "payday" loans, (4) telecommunications, and (5) secured transactions under Revised Article 9 of the Uniform Commercial Code.

## I. SALES OF GOODS AND SERVICES

In several cases involving consumers in Indiana, the consumer did not fare well. On the subject of attorney's fees under the Indiana Deceptive Sales Act,<sup>1</sup> the court of appeals in *Missi v. CCC Custom Kitchens, Inc.*<sup>2</sup> affirmed a trial court's denial of fees even though the consumer prevailed in the action. The Missi family sought damages from CCC alleging breach of warranty, fraud, breach of contract and deceptive acts following their purchase of custom-made cabinets. Despite the fact the Missis won a \$2500 judgment, the trial court denied their claim for fees under Indiana Code section 24-5-0.5-4(a), which provides that the court "may award reasonable attorney fees to the party that prevails."<sup>3</sup> The fee denial was affirmed on appeal. Applying the plain language of the law, Judge Brook stated that the award of attorney's fees is discretionary under this law,<sup>4</sup> and refused to hold that the trial court abused its discretion in denying the fee request.<sup>5</sup>

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1. IND. CODE §§ 24-5-0.5-1 to -12 (1998).

2. 731 N.E.2d 1037 (Ind. Ct. App. 2000).

3. *Id.* at 1041 (quoting IND. CODE § 24-5-0.5-4(a)) (emphasis added by court).

4. *See id.* (citing *Haltom v. Bruner & Meis, Inc.*, 680 N.E.2d 6, 9 (Ind. Ct. App. 1997) (stating term "may" in a statute ordinarily means permissive, discretionary)).

5. *See id.* (citing *In re Shaffer*, 711 N.E.2d 37, 41 (Ind. Ct. App. 1999) (awarding or denying



The decision is unfortunate for consumers, although the fault lies not with the court but with the language of the statute. Some states' consumer protection statutes mandate the award of fees when the consumer prevails, and courts in other states have held that fees are mandatory even when the statutory language provides that the consumer "may sue and recover" reasonable fees.<sup>6</sup> The *Missi* court followed Indiana precedent on this issue and provided yet another illustration of this important weakness in Indiana consumer law. Consumer cases often involve small amounts of money, and substantial obstacles face most consumers who wish to assert their legal rights. Nevertheless, these cases are important to the people directly involved in the dispute. If Indiana lawyers know that their right to statutory fees is uncertain, they will be less likely to accept consumer representation, even in a strong case. As a result, consumers are then left to represent themselves, most likely in small claims courts, if they have the ability and inclination to enforce their rights.

*Lehman v. Shroyer*<sup>7</sup> illustrates an obstacle for consumers under the notice provision of the Deceptive Sales Act.<sup>8</sup> Lehman had a dispute with Shroyer over Shroyer's work repairing and upgrading Lehman's swimming pool. Early in the dispute resolution process, both sides were represented by counsel. Letters were exchanged, and Shroyer ultimately filed an action against Lehman to recover his fee for services rendered on the pool. Lehman's answer contained counterclaims and affirmative defenses, including a claim that Shroyer violated the Deceptive Sales Act. Shroyer's answer to the counterclaim denied violating the statute.<sup>9</sup>

After a bench trial, the court concluded that Lehman's claim under the Deceptive Sales Act should be dismissed because Lehman did not give Shroyer proper advance notice of the statutory claim as required by Indiana Code section 24-5-0.5-5(a).<sup>10</sup> Except in certain circumstances not applicable to the case,<sup>11</sup> the statute requires notice to the defendant before bringing a deceptive act claim as a means of facilitating pre-complaint settlements and giving the supplier a reasonable opportunity to remedy the problem. Judge Sullivan affirmed the decision on appeal, stating that "'a literal application of the notice provisions' is required."<sup>12</sup>

As with the *Missi* case, this holding applied the statute consistent with its

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attorney's fees can be reversed only upon a showing of abuse of discretion), *trans. denied*, Shaffer v. Lung, 726 N.E.2d 308 (Ind. 1999)).

6. See JONATHON SHELDON, NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 8.6.3 n.348 (3d ed. 1991) (citing cases from Minnesota and Louisiana).

7. 721 N.E.2d 365 (Ind. Ct. App. 1999).

8. See IND. CODE § 24-5-0.5-5(a) (1998).

9. See *Lehman*, 721 N.E.2d at 366-69.

10. See *id.* at 368.

11. If the alleged statutory violation is an act done "as part of a scheme, artifice, or device with intent to defraud or mislead," then the consumer need not give advance notice before asserting a violation of the act. IND. CODE § 24-5-0.5-2(7) (1998).

12. *Lehman*, 721 N.E.2d at 369 (quoting *McCormick Piano & Organ Co. v. Geiger*, 412 N.E.2d 842, 849 (Ind. Ct. App. 1980)).



literal terms, but it illustrates another weakness in the law and a trap for the unwary consumer (or his counsel). In this instance, both parties were represented by lawyers during the dispute. Ample opportunity existed for discussing the particulars of the claims and settling the dispute prior to the lawsuit being filed. Moreover, Lehman did not rush to initiate the legal action, but rather responded to a collection action filed by his supplier. Interestingly, Shroyer's counsel did not even raise the notice issue in his answer to the deceptive act counterclaim. Thus, it appears that neither lawyer was aware of the notice requirement throughout the entire pre-lawsuit negotiating process as well as during the litigation phase. Under these circumstances, if Lehman had given Shroyer the required notice before making the counterclaim, it would have served no useful purpose. Nevertheless, the court applied the notice provision strictly and denied recovery.<sup>13</sup>

These two examples of judicial formalism suggest that Indiana judges are strict constructionists, inclined to side with their view of the "plain meaning" of words when deciding cases. While this might be true as a general statement, it is not always the case. A consumer in *Zawistoski v. Gene B. Glick Co.*<sup>14</sup> lost a breach of warranty claim in a landlord-tenant context, when a literal application of the lease might have supported her claim. The plaintiff, a sixty-two-year-old resident in an apartment complex, tripped on a portion of raised sidewalk and fractured her neck. She brought an action alleging negligence and breach of contract/warranty against the landlord. The trial court dismissed the contract claim on summary judgment, and she lost at trial on the negligence claim.<sup>15</sup>

On appeal of the contract claim dismissal, the plaintiff argued that the lease had created a warranty or contractual obligation to keep the property in good, safe condition. Specifically, the lease provided that "[t]he Landlord agrees to . . . maintain the common areas and facilities in a safe condition."<sup>16</sup> In affirming the dismissal of the contract claim, Judge Kirsch concluded that the lease did not create a warranty of safe conditions in the common areas. He reasoned that, when read in context, the contract provision did no more than restate the common law duty of the landlord to exercise reasonable care in maintaining the common areas in a reasonably fit condition. It did not warrant or guarantee that the grounds would be safe. In the court's view, if the landlord exercised reasonable care in maintaining the premises (as the jury so found on the negligence count), then no more would be required.<sup>17</sup>

While the decision is defensible, it could well have been decided otherwise.

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13. *See id.* In an attempt to ameliorate the harshness of the decision, the court addressed the merits of the Lehman's claim under the deceptive sales act and concluded that it was likely to fail in any event. *See id.* Of course, the trial court dismissed the claim without findings of fact, so the appellate court's conclusions are somewhat speculative and hardly a substitute for a complete factual inquiry below.

14. 727 N.E.2d 790 (Ind. Ct. App. 2000).

15. *See id.* at 792.

16. *Id.* at 793.

17. *See id.* at 794.



The lease, which was drafted by the lessor and therefore should be construed (if ambiguous) against its interest,<sup>18</sup> stated unequivocally that the landlord would maintain common areas in a safe condition, not that it would make reasonable efforts to maintain a reasonable degree of safety. Judge Kirsch construed the lease favorably for the landlord, whereas other judges might not have been so forgiving. Lawyers should use caution when stating the landlord's obligations to ensure that the lease does no more than what is required by common law, unless a higher duty is intended.

The consumer fared better in *Mullis v. Brennan*,<sup>19</sup> which involved a dispute between a home improvement contractor (Mullis) and homeowners (the Brennans). Mullis entered into a contract to build a room addition for the Brennans, but the Brennans soon complained about the quality of the work being performed. When Mullis failed to correct the problems, the Brennans withheld partial payment. Mullis then walked off the job, filed a mechanics lien and ultimately sued for his lost profits. The Brennans counterclaimed for their extra costs in completing the job with other contractors, damages for violating both the Indiana Home Improvement Contracts Act<sup>20</sup> and the Deceptive Sales Act,<sup>21</sup> plus attorney's fees. The Brennans won on all counts at trial, and on appeal as well.<sup>22</sup> The opinion of Judge Ratliff on appeal offered some important lessons for both consumers and home improvement contractors.

Mullis first contended that he should not be held personally liable because his business was incorporated. The court noted, however, that Mullis did not sign the contract in his capacity as agent for the corporation, and therefore he was individually liable.<sup>23</sup> The lesson here for small businesses is to be careful about the manner in which contracts are signed. If corporate obligations are intended, the agreement must be signed in the corporation's name, or at least in a representative capacity (e.g., John Doe, as agent for XYZ Corp.).<sup>24</sup>

On a related issue, Mullis also contended that the trial court erred in determining that the mechanic's lien filed by his corporation against the Brennans was invalid. The trial court concluded that the lien was void because (1) the corporation did not provide any work and/or materials for the project, and (2) Mullis, not the corporation, was the party to the contract from which the claim against the Brennans arose. The appellate court agreed.<sup>25</sup> The only party who was entitled to file the lien was the actual contracting party, Mullis, not his

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18. See, e.g., *Fresh Cut, Inc. v. Fazli*, 650 N.E.2d 1126, 1132 (Ind. 1995); *Lacy v. White*, 288 N.E.2d 178, 183 (Ind. App. 1972).

19. 716 N.E.2d 58 (Ind. Ct. App. 1999).

20. IND. CODE §§ 24-5-11-1 to -14 (1998).

21. *Id.* §§ 24-5-0.5-1 to -12.

22. See *Mullis*, 716 N.E.2d at 62.

23. See *id.* at 63.

24. See *Winkler v. V.G. Reed & Sons, Inc.*, 619 N.E.2d 597, 599 (Ind. Ct. App. 1993) (stating corporate officer signing in representative capacity is generally not liable for contract obligations incurred), *aff'd*, 638 N.E.2d 1228 (Ind. 1994).

25. See *Mullis*, 716 N.E.2d at 63.



corporation. Because the corporation filed the lien, the designation of the wrong claimant rendered the lien invalid.

Mullis further contended that the trial court erred in determining that he was liable for damages for breach of contract, arguing that the Brennans breached first by withholding payment. "The trial court found that the Brennans presented 'overwhelming evidence' to show that[, at the time the Brennans refused to pay,] Mullis was not performing his contract in a workmanlike manner and that the room addition was not structurally sound and free of substantial defects . . . ." <sup>26</sup> Additionally, the trial court found that the Brennans "continually and clearly expressed their concerns about problems with the foundation, the frame, the roof, and the generally poor workmanship." <sup>27</sup> On appeal, Judge Ratliff noted that "[t]he law implies a duty in every contract for work or services that the work or services will be performed skillfully, carefully, diligently, and in a workmanlike manner," <sup>28</sup> and observed that the term "workmanlike manner" is a term of art in the building trade that means: "To do the work in the building of a house in a good workmanlike manner is to do the work as a skilled workman would do it." <sup>29</sup> Failure to perform in a workmanlike manner is a factual inquiry, and the record supported the trial court's findings.

On the Brennans' claim under the Home Improvement Contracts Act, the court sustained the trial court's findings that Mullis violated the act in the following ways: <sup>30</sup>

- a. The Contract did not contain the address of the home improvement supplier, Mullis, and did not contain each of the telephone numbers and names of any agent to whom consumer problems and inquiries could be directed. <sup>31</sup>
- b. The Contract did not contain the date that the home improvement contract was submitted to the Brennans and any time limitation on the Brennans' acceptance of the Contract. <sup>32</sup>
- c. The Contract did not contain a reasonably detailed description of the proposed home improvements. <sup>33</sup>
- d. The Contract did not contain the approximate starting and completion dates of the home improvements. <sup>34</sup>
- e. The Contract did not contain a statement of any contingencies that would materially change the approximate completion date of the

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26. *Id.* at 64.

27. *Id.*

28. *Id.* (citing *Data Processing Servs., Inc. v. L.H. Smith Oil Corp.*, 492 N.E.2d 314, 319 (Ind. Ct. App. 1986)).

29. *Id.* (quoting *Morris v. Fox*, 135 N.E. 663, 664 (Ind. App. 1922)).

30. *See id.* at 65.

31. *Id.* (citing IND. CODE § 24-5-11-10(a)(2) (1998)).

32. *Id.* (citing IND. CODE § 24-5-11-10(a)(3) (1998)).

33. *Id.* (citing IND. CODE § 24-5-11-10(a)(4) (1998)).

34. *Id.* (citing IND. CODE § 24-5-11-10(a)(6) (1998)).



contract.<sup>35</sup>

The court further noted that under section 24-5-11-14 of the Indiana Code, a home improvement supplier who violates the Act commits a deceptive act as well, actionable under the Deceptive Sales Act, which gives rise to a claim for attorney's fees.<sup>36</sup> Moreover, the Indiana Supreme Court has recognized that a "building contractor occupies a position of trust with" those whom he enters into a home improvement contract.<sup>37</sup> Because few consumers are knowledgeable about the home improvement industry, "consumers [must] rely on the expertise of the contractor."<sup>38</sup> Accordingly, courts in Indiana hold the contractor to a strict standard.<sup>39</sup> In light of these policies, and the combined acts of non-compliance with Mullis' statutory and contractual duties, the court of appeals affirmed the finding that Mullis committed a deceptive act, justifying an award of damages and attorney's fees for both trial and appellate expenses.<sup>40</sup>

Another successful consumer action was *A.J.'s Automotive Sales, Inc. v. Freet*,<sup>41</sup> which involved a falsified representation of an automobile's mileage at the time of sale. The Freet's brought suit against a used car dealer and a prior owner of the vehicle, alleging violations of the federal Odometer Act<sup>42</sup> and the Indiana Deceptive Sales Act, after learning that the 1984 Suburban they purchased actually had 180,788 miles on it when the odometer declaration said 80,788. The trial court issued an order rescinding the sales contract and requiring the defendants to pay damages.<sup>43</sup> On appeal, Judge Friedlander's opinion affirmed most of the trial court's rulings<sup>44</sup> and made several holdings of interest to consumers.

The court first held that the federal odometer statute applies not only to car dealers, but also to an individual who sells or trades a car to a dealer,<sup>45</sup> and that the individual in this case could be held liable for falsifying the actual mileage in a suit brought by the subsequent purchasers of the vehicle.<sup>46</sup> Therefore, the trial court properly denied the previous owner's motion for summary judgment on the odometer claim. The court did conclude, however, that the previous owner could not be held liable under the Indiana Deceptive Sales Act, which only

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35. *Id.* (citing IND. CODE § 24-5-11-10(a)(7) (1998)).

36. *See id.* at 65 (applying IND. CODE § 24-5-0.5-4(a) (1998)).

37. *F.D. Borkholder Co. v. Sandock*, 413 N.E.2d 567, 571 (Ind. 1980).

38. *Mullis*, 716 N.E.2d at 65.

39. *See id.*

40. *See id.* at 66-67.

41. 725 N.E.2d 955 (Ind. Ct. App. 2000), *trans. denied*, No. 71A03-9909-CV-343, 2000 Ind. LEXIS 734, at \*1 (Aug. 16, 2000).

42. Motor Vehicle Information & Cost Savings Act, 49 U.S.C. § 32701 (1997).

43. *See A.J.'s Auto. Sales*, 725 N.E.2d at 959.

44. *See id.* at 959, 970.

45. *See id.* at 962-63 (citing *Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381, 1387 (D. Neb. 1977), *aff'd*, 578 F.2d 721 (8th Cir. 1978)).

46. *See id.*



applies to "suppliers" of goods and services.<sup>47</sup> A "supplier" must "regularly engage[] in or solicit[] consumer transactions,"<sup>48</sup> and there was no evidence that the previous owner had done so in this instance.<sup>49</sup> Applying the "clear and unambiguous" language of the statute, the court dismissed the deceptive act claim.<sup>50</sup>

## II. DEBT COLLECTION

The U.S. Court of Appeals for the Seventh Circuit decided several debt collection cases over the past twelve months, clarifying some important issues for both consumer debtors and persons who engage in debt collection activities. The results for consumers were mixed.

In *Miller v. McCalla*,<sup>51</sup> an individual took out a mortgage to purchase a house for personal use, but later converted the house to rental property. After the individual defaulted on the mortgage, a law firm representing the creditor sent him dunning letters that allegedly violated the federal Fair Debt Collection Practices Act<sup>52</sup> by failing to state the amount of the debt. The district court granted summary judgment for the law firm on the ground that the debt was no longer a consumer debt and, therefore, the FDCPA did not apply.<sup>53</sup>

The Seventh Circuit reversed. Judge Posner noted that there are no reported decisions squarely deciding this issue, but in looking at the language and general purposes of the statute, he concluded that the character of the loan at the time it was created should govern whether the FDCPA applies.<sup>54</sup> Resisting the opportunity to decide the case solely on a grammatical construction of the statute, Judge Posner observed, in rhetoric that might have been directed to the stronger textualists among his brethren, that "the purpose of statutory interpretation is to make sense out of statutes not written by grammarians."<sup>55</sup> The creditor is more likely to know the character of the loan (commercial or personal) at the outset of the transaction than at any subsequent time when the debtor may have changed the use of the property, so this construction of the statute will promote certainty as creditors decide when to comply with its mandates. In this case, the loan was a consumer transaction when it was made, and after its creation the debtor converted the property to an income-producing asset. The FDCPA therefore still governed the collection efforts despite the change in use.<sup>56</sup>

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47. *Id.* at 964.

48. IND. CODE § 24-5-0.5-2(a)(3) (1998).

49. *See A.J.'s Auto. Sales*, 725 N.E.2d at 963-64.

50. *Id.* at 964 (citing *Campbell v. State*, 716 N.E.2d 577 (Ind. Ct. App. 1999)).

51. 214 F.3d 872 (7th Cir. 2000), *reh'g denied*, No. 98-C-5563, 2000 U.S. App. LEXIS 18232, at \*1 (July 26, 2000) (en banc).

52. 15 U.S.C. § 1692 (1998).

53. *See Miller*, 214 F.3d at 874.

54. *See id.* at 876.

55. *Id.* at 874-75 (looking at the definitions of "debt" and "consumer").

56. *See id.* at 875.



The Seventh Circuit also decided an interesting issue concerning the scope of law firm liability under the FDCPA. The consumer had actually sued two law firms—one (organized as a limited liability company) that actually attempted to collect the debt by sending the dunning letters, and another firm in which the first LLC firm was a partner. Judge Posner observed that this was an unusual law practice structure, but concluded that both firms could be held liable under the statute, applying basic partnership law.<sup>57</sup> Unlike affiliated corporations, partnerships do not enjoy limited liability. The liability of a partnership is imputed to the partners, and so the consumer was entitled to sue the individual partners as well as the partnership.<sup>58</sup>

The Seventh Circuit in *Pettit v. Retrieval Masters Creditors Bureau, Inc.*,<sup>59</sup> held that individual shareholders or officers of a corporate debt collector are not liable under the FDCPA regardless of how much day-to-day control they exercise over the operations of the company.<sup>60</sup> Unless the individual himself comes within the definition of “debt collector” under the statute, he cannot be held liable. The FDCPA applies the principle of vicarious liability, and the corporation is liable for the acts of its employees who violate the act. The court went so far as to state that “suits against the owners [or officers] of a debt collection company who are not otherwise debt collectors are frivolous and might well warrant sanctions.”<sup>61</sup>

An important part of the FDCPA is the requirement that notices not confuse debtors about certain rights they have under the law. The Seventh Circuit in *Walker v. National Recovery, Inc.*<sup>62</sup> held that the question whether a notice is confusing is a question of fact, which can be explored by testimony and other evidence such as consumer surveys.<sup>63</sup> The court therefore held that a complaint alleging that a particular notice confused recipients may not be dismissed under Federal Rules of Civil Procedure 12(b)(6)—a complaint stating “‘this notice is confusing’ states a claim on which relief may be granted.”<sup>64</sup> The court reasoned that “district judges are not good proxies for the ‘unsophisticated consumers’ whose interests the statute protects.”<sup>65</sup> “Unsophisticated readers may require more explanation than do federal judges; what seems pellucid to a judge, a legally sophisticated reader, may be opaque to someone whose formal education ended after sixth grade. To learn how an unsophisticated reader reacts to a letter, the judge may need to receive evidence.”<sup>66</sup>

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57. *See id.* at 876.

58. *See id.*

59. 211 F.3d 1057 (7th Cir. 2000), *reh'g denied*, No. 98-C-1154, 2000 U.S. App. LEXIS 12848, at \*1 (June 7, 2000) (en banc).

60. *See id.* at 1059.

61. *Id.*; *see also* *White v. Goodman*, 200 F.3d 1016, 1019 (7th Cir. 2000).

62. 200 F.3d 500 (7th Cir. 1999).

63. *See id.* at 501.

64. *Id.* (citing *Johnson v. Revenue Mgmt. Corp.*, 169 F.3d 1057 (7th Cir. 1999)).

65. *Id.* (citing *Johnson*, 169 F.3d at 1057).

66. *Id.* (quoting *Johnson*, 169 F.3d at 1060); *see also* *Marshall-Mosby v. Corporate Receivables, Inc.*, 205 F.3d 323, 326 (7th Cir. 2000) (reversing dismissal under FED. R. CIV. P.



The *Walker* case is important to consumer lawyers who draft FDCPA claims, but it does not mean that every case alleging confusion in a dunning letter will survive a motion to dismiss. The extent of protection afforded the "unsophisticated" consumer in the Seventh Circuit is a subject of considerable discussion. In *Pettit*, Judge Manion wrote that the plaintiff must submit some credible evidence, other than speculating on how a naive debtor might interpret the communication, to survive a summary judgment motion.<sup>67</sup> In another recent Seventh Circuit decision, *White v. Goodman*,<sup>68</sup> Judge Posner wrote that while the FDCPA protects the unsophisticated debtor, it does not protect "the irrational one."<sup>69</sup> The Act is not violated by a dunning letter that is allegedly confusing only when given "an ingenious misreading."<sup>70</sup>

While it may seem odd to ponder the difference between an "unsophisticated" consumer and an "irrational" one, the Seventh Circuit is attempting to send a message to the bar that FDCPA claims will be taken seriously in the Circuit, and that plaintiff's lawyers will be given ample opportunity to make a case that a dunning letter or other communication from a debt collector is misleading. They cannot be lazy, however, and expect to get past summary judgment merely by arguing that some hypothetical consumer could possibly be misled by a creative, strained interpretation of the communication. They will have to present credible evidence, in the form of surveys, expert testimony or otherwise, to support their claim that an unsophisticated consumer might be misled.

Finally, the Seventh Circuit had occasion to resolve a difference of opinion among the district courts concerning the definition of "net worth" under the FDCPA. The act provides that "in the case of a class action, [the total recovery shall not] exceed the lesser of \$500,000 or 1 per centum of the net worth of the debt collector."<sup>71</sup> The statute does not define "net worth," and one court defined the term as the book value of the company, i.e., assets listed on its balance sheet minus liabilities, sometimes called the "balance sheet net worth."<sup>72</sup> Another district judge reached a different conclusion and used the fair market value of the company, which would usually be higher because it would likely include the value of good will and other intangible assets.<sup>73</sup> In *Sanders v. Jackson*,<sup>74</sup> the Seventh Circuit held that book value was the appropriate measure of net worth, a decision that will reduce the limit for class action damages under the FDCPA

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12(b)(6)).

67. See *Pettit v. Retrieval Masters Creditors Bureau, Inc.*, 211 F.3d 1057, 1061 (7th Cir. 2000), *reh'g denied*, No. 98-C-1154, 2000 U.S. App. LEXIS 12848, at \*1 (June 7, 2000) (en banc).

68. 200 F.3d 1016 (7th Cir. 2000).

69. *Id.* at 1020.

70. *Id.*

71. 15 U.S.C. § 1692k(a)(2)(B) (1998).

72. See *Sanders v. Jackson*, 33 F. Supp. 2d 693, 696 (N.D. Ill. 1998), *aff'd*, 209 F.3d 998 (7th Cir. 2000).

73. See *Scott v. Universal Fid. Corp.*, 42 F. Supp. 2d 837, 841 (N.D. Ill. 1999).

74. 209 F.3d at 998.



in most instances. In the case before the court, the apparent book value of the defendant was only about \$100,000, but its fair market value was alleged to be \$1.8 million.<sup>75</sup>

As a study of statutory interpretation, the *Sanders* opinion is interesting. The court began by inquiring about the "plain meaning" of the term, but concluded that "net worth" has no obvious, singular meaning even with the assistance of dictionary definitions.<sup>76</sup> It then considered how the term had been used in other statutes enacted by Congress, and noted that Congress had not defined the term in other statutes either.<sup>77</sup> The court finally decided the issue by looking at how other courts had defined "net worth" when interpreting other federal acts where the term was used, and saw that the term has usually been construed in accordance with generally accepted accounting principles (GAAP).<sup>78</sup> Noting that those statutes served significantly different purposes than the FDCPA, but not wanting to create a different definition of "net worth" just for debt collection cases, the court decided to follow those other decisions. Since GAAP provides that internally developed goodwill is not reported on a company's financial statements, "net worth" for purposes of the FDCPA is limited to the book value of the company.<sup>79</sup>

### III. "PAYDAY" LOANS

The Indiana Office of Attorney General issued an opinion in January 2000, concluding that "payday" or "deferred-deposit" lenders violate Indiana law when they offer supervised loans with finance charges that exceed the annual percentage rates (APRs) set out in Indiana's consumer credit code.<sup>80</sup> Finance charges that exceed the statutory caps outlined in the code are subject to refund. Moreover, a transaction is void and violates Indiana's loansharking statute if the lender charges an interest rate greater than twice the rate authorized for finance charges in the code. The opinion noted, however, that no controlling Indiana authority exists on these issues, and that there is some "doubt" about how an Indiana court might resolve them.<sup>81</sup>

Under a typical payday loan, a lender signs a contract with a borrower, agreeing to take the borrower's postdated check as collateral for a cash advance. The lender agrees not to deposit the check for a specified period of time, and pays cash immediately to the borrower. For example, to obtain a \$100 loan, the borrower might pay a thirty-three dollar finance charge and write a check for \$133 (or pay the thirty-three dollars in cash and write a check for \$100). The lender gives the borrower cash and agrees not to deposit the borrower's check for

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75. *See id.* at 1000.

76. *See id.* (looking at definitions in BLACK'S LAW DICTIONARY).

77. *See id.* at 1000-01.

78. *See id.* at 1001-02.

79. *See id.* at 1002.

80. Op. Ind. Att'y Gen. No. 2000-1, 2000 Ind. AG LEXIS 1, at \*1 (Jan. 19, 2000).

81. *See id.*



two weeks.

If, after two weeks, the borrower lacks sufficient funds to cover the check, she can "roll over" the loan by paying an additional "loan finance charge," thereby earning additional time to repay an even larger amount of money. In little time, this series of "charges" can amount to hundreds or even thousands of percentage points calculated on an annual basis. If these costs are deemed finance charges, they would ordinarily violate Indiana's loansharking statute. Lenders claim they are not finance charges and are expressly authorized by Indiana's consumer credit code.

An interpretive problem arises because Indiana's consumer credit code authorizes lenders of certain consumer loans to assess "a minimum loan finance charge of not more than thirty dollars."<sup>82</sup> Separately, however, Indiana's loansharking statute makes it a crime to charge an interest rate greater than twice the rate authorized for finance charges in the consumer credit code.<sup>83</sup> For most payday loans, the loansharking statute would prohibit more than a seventy-two percent APR.

The legal question addressed in the attorney general's opinion is whether these statutes conflict or whether they can be reconciled. Using a traditional tool of statutory construction and attempting to give full effect to both statutes, the opinion concluded "that Indiana's consumer credit and loansharking statutes are not inconsistent and can be interpreted harmoniously."<sup>84</sup> Lenders may contract for and receive one or more thirty-three dollar loan finance charges, but the resulting APR cannot exceed the interest limit established in the loansharking statute.<sup>85</sup> The opinion reasoned that "[t]he General Assembly [] elected to exempt a discrete set of business practitioners from the state's interest and usury laws" (e.g., pawnbrokers), and payday lenders are not among the exempted parties.<sup>86</sup> Absent a statutory provision that expressly exempts payday lenders, their business practices are subject to Indiana's interest and usury laws.

Soon, this issue will be resolved in Indiana and in other states, possibly by the courts,<sup>87</sup> but more likely by the legislature.<sup>88</sup> Payday loans have become

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82. IND. CODE § 24-4.5-3-508(7) (1998).

83. *See id.* § 35-45-7-2.

84. Op. Ind. Att'y Gen. No. 2000-1, 2000 Ind. AG LEXIS at \*3.

85. *See* IND. CODE § 35-45-7-2 (1998).

86. Op. Ind. Att'y Gen. No. 2000-1, 2000 Ind. AG LEXIS at \*5. *See also* IND. CODE §§ 28-7-5-28 to -29 (1998).

87. The Seventh Circuit has been seeing so many payday lender cases, many of which allege violations of the federal Truth in Lending Act, that it has designated a special panel to hear all appeals. *See Smith v. Check-N-Go of Ill., Inc.*, 200 F.3d 511, 516 (7th Cir. 1999) (circling due-date information on Truth in Lending Act form is not violation of conspicuous disclosure requirements of the act). In November 2000, the Indiana Supreme Court accepted certification of the question from three federal district courts that were considering the legality of payday loans. *Livingston v. Fast Cash USA, Inc.*, 737 N.E.2d 1155 (Ind. 2000). The decision had not yet been rendered at press time.

88. Arkansas recently passed such a law. *See* Theo Francis, *Cashing in on Cash Advances*,



immensely popular throughout the country, and may serve a legitimate purpose in the consumer credit market. If Indiana's usury limits apply to their "service charges," the industry might not be financially viable. The topic could warrant separate legislation designed to regulate the special characteristics of this type of consumer transaction, as the legislature did with rent-to-own contracts and other subject-specific laws.<sup>89</sup>

#### IV. TELECOMMUNICATIONS

In a class action on behalf of telephone customers in five states including Indiana, consumers sued Ameritech Corporation alleging that the telephone service provider improperly used its monopoly power to engage in exclusionary practices that prevented competitors from entering the market, resulting in excessive costs to rate payers, in violation of the Sherman Act<sup>90</sup> and the Telecommunications Act of 1996.<sup>91</sup> The plaintiffs were consumers of local telephone services in Ameritech's service area. When Congress enacted the Telecommunications Act, the consumers looked forward to the same kind of competition in the local services market that occurred several decades earlier in the telephone equipment and long distance markets. When this market penetration did not occur as the plaintiffs had hoped, they alleged that Ameritech was at fault by not taking adequate steps to facilitate entry.

Under the Telecommunications Act, Ameritech has special responsibilities as the local exchange carrier to cooperate with potential entrants who would like to break into the local services market. Believing that Ameritech was not adequately pursuing its obligations under the Act and unlawfully monopolizing under Section 2 of the Sherman Act, consumers filed a class action suit in 1997.

The district court for the Northern District of Illinois dismissed the case on the ground that the plaintiffs lacked standing under both laws. On appeal in *Goldwasser v. Ameritech Corp.*,<sup>92</sup> the Seventh Circuit held that the plaintiffs did have standing as consumers to assert the claims, but that they failed to allege any wrongful conduct independent of Ameritech's failure to comply with the requirements of the Telecommunications Act.<sup>93</sup> Moreover, since their request for damages under the Telecommunications Act was essentially a claim for improper overcharges (paying higher rates than they otherwise would have paid), the "filed rate doctrine" barred the court from re-examining the reasonableness of Ameritech's rates that were filed with and approved by the governing regulatory

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ARK. DEMOCRAT-GAZETTE, July 16, 2000, at G1. California is considering bills as well. See Miguel Bustillo, *Lawmakers Push 2 Bills to Regulate "Payday Loan" Industry*, L.A. TIMES, May 17, 2000, at A24.

89. See, e.g., IND. CODE §§ 24-5-0.5 to -18 (regulating more than one dozen specific types of consumer transactions).

90. 15 U.S.C. §§ 1-3 (1997).

91. Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C. (1995)).

92. 222 F.3d. 390 (7th Cir. 2000).

93. See *id.* at 398, 401.



agencies.<sup>94</sup> The result was that the dismissal was proper, and the class action failed.

#### V. SECURED TRANSACTIONS: SOME NEW RULES FOR CONSUMER DEBTORS UNDER UCC REVISED ARTICLE 9

In the Article 9 revision to the UCC, adopted by the Indiana legislature in the 2000 legislative session, some changes were made that affect consumer debtors, although the changes were not as important as they might have been.<sup>95</sup> Early in the drafting process, the National Conference of Commissioners for Uniform State Laws (NCCUSL) had considered adding two significant consumer protection provisions. One would have entitled a prevailing consumer to recover attorney's fees if the secured party had provided by contract for recovery of its own attorney's fees<sup>96</sup> (which is almost always the case in consumer credit contracts).<sup>97</sup> The proposal recognized that consumer credit contracts are contracts of adhesion. Since consumers cannot effectively negotiate for their own fee provisions, fairness demands that both parties (or neither party) should get attorney's fees upon prevailing in a lawsuit. Consumer advocates contended that it was manifestly unfair for only the prevailing creditor to claim fees.

The second proposal would have provided a less onerous reinstatement right in cases where a consumer had paid most of the debt prior to the default, but could not tender the full amount (including accrued interest and the creditor's collection costs) in a single payment thereafter.<sup>98</sup> Both of these proposed changes, and several other pro-consumer proposals, were ultimately rejected in the final NCCUSL draft.

One of the changes that made the final draft is a provision stating that a security agreement describing collateral only by "Article 9 type" is insufficient in consumer transactions when the collateral is "consumer goods" and certain "consumer investments."<sup>99</sup> This means that the description of these types of collateral must be more specific than "all of the debtor's consumer goods and investments." The consumer goods part of this rule does not add much to the law because the Federal Trade Commission's Credit Practices Rule already makes taking nonpossessory, non-purchase security interests in many consumer goods

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94. *Id.* at 402.

95. For an excellent discussion of the implications of Revised Article 9 for consumer transactions, see Jean Braucher, *Deadlock: Consumer Transactions Under Revised Article 9*, 73 AM. BANKR. L.J. 83 (1999).

96. See Revised Article 9, Council Draft No. 3, Nov. 20, 1997, § 9-628. See Braucher, *supra* note 95, at 109.

97. See MICHAEL M. GREENFIELD, CONSUMER TRANSACTIONS 665 (3d ed. 1999).

98. See Revised Article 9, Council Draft No. 3, Nov. 20, 1997, § 9-622.

99. See U.C.C. Rev. § 9-108(e)(2) (2000). The consumer investments listed are securities entitlements, securities accounts or commodity accounts, and these terms are all defined. See *id.* §§ 9-102(a)(15), 9-108(b), referring to current §§ 8-501, 8-102 (1995).



an unfair trade practice, (with some types of consumer goods exempted).<sup>100</sup> Thus, any creditor taking a non-purchase money security interest in consumer goods must describe those goods specifically (e.g., the consumer's television) to comply with the rule. In addition, Revised Article 9 provides that after-acquired property clauses referring to consumer goods are ineffective unless the debtor acquires rights in the goods within ten days after the secured party gives value.<sup>101</sup> As a result of both of these laws, most security interests in consumer goods are purchase money security interests that secure only the item being purchased, and they will usually describe that particular item in the security agreement.

The new prohibition on collateral descriptions is more significant for consumer investments. Without it, creditors might take blanket security interests in a consumer's investment property with such general language as "all securities entitlements, securities accounts and commodities accounts, now owned or hereafter acquired." For consumer investments, Revised Article 9 now requires specific descriptions of the particular investment serving as the collateral.

Revised Article 9 also addresses an unanswered question under the Federal Trade Commission's Holder in Due Course Rule.<sup>102</sup> The rule is silent on the legal effect of a consumer credit contract that is required to contain the FTC notice (that any holder is subject to claims and defenses against the seller of goods or services), but does not. Under Revised Article 9, an assignee of such a contract will be subject to a consumer debtor's claims and defenses, just as if the notice had been included.

Other provisions make worthwhile changes in notices that creditors are required to give consumer debtors. Revised Article 9 lists certain required information that must be included in the notice before collateral in a consumer-goods transaction can be sold.<sup>103</sup> Current Article 9 states that only "reasonable notification" must be sent "of the time and place of any public sale" or "of the time after which any private sale or other intended disposition is to be made."<sup>104</sup> Revised Article 9 requires that the secured party also state that the consumer could be liable for a deficiency after the sale, and give a telephone number that the consumer can call to find out the amount that she must pay to redeem the collateral.<sup>105</sup> It also creates a "safe harbor" notice form that the creditor can use prior to a public sale, informing the consumer that she may attend the sale and bring bidders. The safe harbor form also explains that the consumer can get the property back by paying the full obligation before the secured party sells it (the redemption right).<sup>106</sup> These new requirements should provide the consumer debtor with more information about the significance of a disposition of collateral—that the disposition may not satisfy the debt in full and that

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100. See 16 C.F.R. § 444.2(a)(4) (2000).

101. See U.C.C. Rev. § 9-204(b) (2000) (replacing U.C.C. § 9-204(2) (1995)).

102. See 16 C.F.R. §§ 433.2(a)-(b) (2000).

103. See U.C.C. Rev. § 9-614 (2000).

104. U.C.C. § 9-504(3) (1995).

105. See U.C.C. Rev. § 9-614(1) (2000).

106. See *id.* § 9-614(3).



afterwards, it will be too late to get the property back.

Revised Article 9 also requires an "explanation of calculation of surplus or deficiency,"<sup>107</sup> a new type of post-disposition notice in consumer-goods transactions. If the disposition of the collateral resulted in a surplus, the creditor must give notice of the calculation of the surplus before or when the creditor accounts to the debtor. If the disposition resulted in a deficiency, the creditor must give the notice when it first makes written demand for the deficiency after the disposition. A creditor who decides not to collect a deficiency would not have to send this notice. This will create a record showing whether the creditor has given the consumer any credits (e.g., for payments or credit for unused warranty time). In addition, the notice may provide an incentive for creditors to credit debtors a higher amount to avoid dealing with protests by debtors who otherwise might be surprised to see that their goods realized a low price at the repossession sale, and that the potential deficiency is large.<sup>108</sup>

In addition to these changes applicable only to consumer debtors, two new rules in Revised Article 9 apply to all debtors but are particularly important for consumers. Revised Article 9 adopts a definition of "good faith" that includes not only "honesty in fact," but also "the observance of reasonable commercial standards of fair dealing."<sup>109</sup> This definition could lend some support to lender liability precedent that requires a secured party to act reasonably when declaring a default and accelerating a debt, though the impact in Indiana is less certain.<sup>110</sup> The new statute also adds a provision dealing with a common problem: unreasonably low prices in dispositions of collateral to the creditor itself, a person related to the creditor, or a secondary obligor (e.g., a guarantor). If the sale price "is significantly below the range of proceeds" in a hypothetical disposition to a buyer unrelated to the creditor, then the surplus or deficiency will be calculated on the basis of a disposition to that hypothetical buyer.<sup>111</sup>

### CONCLUSION

Although the Indiana courts and legislature were relatively quiet in addressing consumer issues in the year 2000, there are some important matters lurking on the horizon. The payday loan controversy will continue, with the legislature likely to face the issue in the next session. Revised Article 9 will also raise some questions as it takes effect and generates litigation over its meaning

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107. *See id.* § 9-616.

108. The remedy for noncompliance with the new requirement of notice of calculation of surplus or deficiency does not include statutory damages, however. In fact, a secured party is not liable at all for failing to send these notices unless the failure is "part of a pattern, or consistent with a practice, of noncompliance," in which case there is liability for \$500. *Id.* § 9-625(e)(5).

109. *Id.* § 9-102(43) & cmt. 19.

110. *See, e.g.,* Duffield v. First Interstate Bank of Denver, 13 F.3d 1403 (10th Cir. 1993); K.M.C. Co. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985); Alaska Statebank v. Fairco, 674 P.2d 288 (Alaska 1983) (recognizing good faith requirement for lenders).

111. U.C.C. Rev. § 9-615(f)(2) (2000).



and function. Article 2, dealing with the sale of goods, is also under revision and will create its own interpretive problems for consumers and other buyers who are subject to its provisions. Thus, there is much to anticipate in the years to come.

## 2000 SURVEY OF INDIANA CONTRACT LAW

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### INTRODUCTION

Questions about contracts arise on a regular basis. This Article surveys key developments in cases involving contracts during the survey period. This Article does not attempt to catalog the majority of those cases, nor does it intend to suggest that other cases during the survey period do not provide significant analysis or application of the law. The cases are divided into topic areas, roughly related to the type of contract involved: agency, insurance, settlement, arbitration, employment, and oral agreements.

### I. AGENCY—CAPACITY TO CONTRACT

A seemingly well-settled area of law—an agent's ability to bind the principal—was the subject of two opinions from the Indiana Supreme Court during the survey period. These cases provided the court the opportunity to revisit established areas of law and remind us that even well-established rules cannot be blindly applied, but instead must be evaluated against the nuances of the facts.

In the first case, *Oil Supply Co. v. Hires Parts Service, Inc.*,<sup>1</sup> a man named Dolin owed money to both Oil Supply and Hires. In an effort to get paid, Oil Supply agreed to let Dolin arrange sales of automotive supplies and, in essence, work off his debt. Without mentioning his employment relationship with Oil Supply, Dolin offered Hires 720 cases of antifreeze in payment of his debt. Hires accepted Dolin's offer, Dolin submitted the order to Oil Supply, and Oil Supply shipped 720 cases to Hires. When accepting the shipment, Hires' employee signed a document that showed that the shipment came from Oil Supply. Needless to say, Oil Supply expected to be paid and was unwilling to allow its supplies to be used to pay off Dolin's debt to Hires. Oil Supply sued Hires. The trial court awarded Oil Supply the amount of the antifreeze, but allowed Hires to set off Dolin's debt against the judgment. The court of appeals affirmed and transfer was granted.<sup>2</sup>

The supreme court began its analysis with the premise that "[a]n agent is one who acts on behalf of some person, with that person's consent and subject to that

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1. 726 N.E.2d 246 (Ind. 2000).

2. See *id.* at 248.



person's control."<sup>3</sup> When a party to a transaction does not know that the party with whom it is dealing is acting for a principal, the relationship is called an undisclosed agency, and the party for whom the agent acts is the undisclosed principal.<sup>4</sup> The court affirmed the lower courts' determinations that Oil Supply was an undisclosed principal. However, it disagreed with the analysis applied by the lower courts that allowed Hires to offset Dolin's debt. The supreme court explained that the lower courts applied a well-recognized rule of law, but drew the wrong conclusion from it. The supreme court agreed with the lower courts that:

One who contracts with the agent of an undisclosed principal, supposing that the agent is the real party in interest, and not being chargeable with notice of the existence of the principal, is entitled, if sued by the principal on the contract, to set up any defenses and equities which he could have set up against the agent had the latter been in reality the principal suing on his own behalf.<sup>5</sup>

It disagreed, however, that Hires was not chargeable with notice of the existence of the principal because the shipping documents made no mention of Dolin, but clearly declared that the goods were shipped by Oil Supply. Since Hires had the last opportunity to question the transaction before the loss was suffered, with notice of Oil Supply's involvement, it was not entitled to assert the defense it would have had against Dolin. The court also approved the added benefit of its resolution of this issue: preventing a bad agent from shifting debt.<sup>6</sup>

Justice Boehm, concurring in a separate opinion in which Justice Dickson joined, agreed that the analysis was accurate, but thought a simpler analysis applied. The concurring opinion would have found a fraud perpetrated on both parties and allowed the parties to rescind the contract based on fraud and possibly mutual mistake of fact.<sup>7</sup>

In the second significant opinion on capacity to bind a principal, the supreme court considered the authority of the president of a corporation to bind the corporate entity. In *Menard, Inc. v. Dage-MTI, Inc.*,<sup>8</sup> Menard offered to purchase part of a parcel of land from Dage, but Dage's board of directors rejected the offer because of certain terms in the offer. Subsequently, the board authorized the president "to offer for sale" the entire parcel. However, the board told the president that he was not authorized to negotiate the terms of the sale or to accept an offer without board approval. Finally, the board told the president that any offer with the objectionable terms would be rejected.<sup>9</sup>

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3. *Id.* (citing *Dep't of Treasury v. Ice Serv., Inc.*, 41 N.E.2d 201 (Ind. 1942)).

4. *See id.* at 248-49 (citing RESTATEMENT (SECOND) OF AGENCY § 4(3) (1958)).

5. *Id.* at 249 (quoting *Oil Supply Co. v. Hires Parts Serv., Inc.*, 670 N.E.2d 86, 89 (Ind. Ct. App. 1996), *rev'd*, 726 N.E.2d at 246).

6. *See id.* at 248, 250.

7. *See id.* at 251 (Boehm, J., concurring).

8. 726 N.E.2d 1206 (Ind. 2000).

9. *See id.* at 1209.



Shortly thereafter, Menard tendered a second offer with the same objectionable provisions. However, this proposal was for the purchase of the entire parcel and was \$250,000 more than the minimum purchase price set by the board. During a week of discussions, the president negotiated the terms with Menard and then signed the Menard agreement, representing that "[t]he persons signing this Agreement on behalf of the Seller are duly authorized to do so and their signatures bind the Seller in accordance with the terms of this Agreement."<sup>10</sup> No one at Dage informed Menard that the president's authority was limited to solicitation of offers. Upon learning of the signed agreement, the Board attempted to extricate itself from the transaction, but did not give Menard notice of its intent to avoid the agreement until nearly four months later.<sup>11</sup>

The supreme court, applying the standards for review of findings of fact and conclusions of law pursuant to Indiana Trial Rule 52(A),<sup>12</sup> concluded that the evidence supported the trial court's findings of fact, but it held that the judgment was clearly erroneous because it relied on an incorrect legal standard. The court concluded that the trial court and the court of appeals erroneously relied upon principles of "actual authority" and "apparent authority" when they should have employed principles of "inherent authority."<sup>13</sup>

Actual authority is created "by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account."<sup>14</sup> In contrast, apparent authority arises from the principal's "indirect or direct manifestations to a third party" that give the third party a reasonable belief that the agent was authorized by the principal to take the action.<sup>15</sup> The acts or representations by the agent are not relevant to a determination of apparent authority. The court explained that Indiana has taken an expansive reading of apparent authority and included "inherent agency power" within that concept. Inherent authority differs from apparent authority, however, and "originates from the customary authority of a person in the particular type of agency relationship so that no representations beyond the fact of the existence of the agency need be shown."<sup>16</sup> The court, quoting a Seventh Circuit opinion applying a concept articulated by Judge Learned Hand, explained:

[T]he scope of an agency must be measured "not alone by the words in which it is created, but by the whole setting in which those words are

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10. *Id.* at 1210.

11. *See id.*

12. When the court reviews findings of fact and conclusions of law entered pursuant to Indiana Trial Rule 52(A), "[t]he findings or judgment are not to be set aside unless clearly erroneous, and due regard is to be given to the trial court's ability to assess the credibility of witnesses." *Id.* (citing IND. TRIAL RULE 52(a)).

13. *Id.*

14. *Id.* (quoting *Scott v. Randle*, 697 N.E.2d 60, 66 (Ind. Ct. App. 1998)).

15. *Id.*

16. *Id.* at 1211 (quoting *Cange v. Stotler & Co.*, 826 F.2d 581, 591 (7th Cir. 1987)).



used, including the customary powers of such agents" and thus the contract was enforceable because "the customary implication would seem to have been that [the agent's] authority was without limitation of the kind here imposed." The principal benefits from the existence of inherent authority because "the very purpose of delegated authority is to avoid constant recourse by third persons to the principal, which would be a corollary of denying the agent any latitude beyond his exact instructions."<sup>17</sup>

The court relied heavily upon the distinction between an act done by an agent empowered for a specific task and an act done by the corporation through its executive or administrative officers, "which may be termed its inherent agencies."<sup>18</sup> It is this distinction that controls because the president is the agent through whom a corporation generally acts. The determination of the scope of inherent authority requires more than merely showing an act by such an agent. Rather, the court found that a president acts with inherent authority when three things are shown: (1) the president acts within the usual and ordinary scope of his authority as president; (2) the third party reasonably believes the president was authorized to act; and (3) the third party has no notice that the president's authority has been limited by the principal.<sup>19</sup>

In analyzing the first prong, the court noted a distinction between the Restatement approach and Indiana law as set forth in *Koval v. Simon Telelect, Inc.*,<sup>20</sup> which had defined the "usual and ordinary scope" of a president's authority based upon whether the action was in the "usual and ordinary scope of the business in which [the agent] was employed."<sup>21</sup> In contrast, the Restatement (Second) of Agency looks to the agent's office or station within the corporation to gauge the scope of the agent's authority.<sup>22</sup> The court found the Restatement approach to be more appropriate. This clearly is qualified to the corporate facts at issue here, however, and there arguably may be circumstances in which the *Koval* analysis is more appropriate.

On the second prong of the analysis, the court reasoned that Menard's actual knowledge that the Board had previously rejected an offer and that the president previously had lacked the power to act for the corporation on this matter did not defeat the president's inherent authority to act where he was the sole negotiator. Rather, the court looked to "the agent's indirect or direct manifestations to determine whether Menard could have 'reasonably believed' that [the president] was authorized."<sup>23</sup> The court explained that this test is in "contradistinction to the test for apparent authority, which looks to the principal's indirect or direct

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17. *Id.* at 1211-12 (quoting *Cange*, 826 F.2d at 591) (internal citations omitted).

18. *Id.* at 1212.

19. *See id.* at 1212-13.

20. 693 N.E.2d 1299 (Ind. 1998).

21. *Menard*, 726 N.E.2d at 1213 (quoting *Koval*, 693 N.E.2d at 1304).

22. *See id.* (citing RESTATEMENT (SECOND) OF AGENCY § 161 (1958)).

23. *Id.* at 1214.



manifestations” to determine the reasonableness of the third party’s belief.<sup>24</sup>

The third prong requires consideration of whether the third party has notice that the agent was not authorized to act for the principal and is a “narrow inquiry focusing on the specific transaction.”<sup>25</sup> The court noted that Menard had notice previously that the president needed the board’s approval for sale of the land, and “this knowledge would have vitiated the apparent authority of a lower-tiered employee or a prototypical general or special agent”<sup>26</sup> because such agents have only apparent authority, not the inherent authority of the president. When the agent has inherent authority derived from his status, the third party is not “required to scrutinize too carefully at a knowledge or awareness that the officer’s authority has possibly been limited.”<sup>27</sup> Applying this three-prong analysis, the court held that Dage was bound by its inherent agent’s actions.<sup>28</sup>

This test of the inherent agent’s actions, while seemingly reasonable on the facts of this case, should serve as a caution to corporations and their attorneys. In applying the standards of this case, when an officer of a corporation acts, his action may bind the corporation even when he acted without authority and when the third party had notice that the officer’s actions required ratification by the principal. Under this analysis, an officer can create authority for himself simply by representing he has authority. A court’s inquiry into the transaction will be very fact-sensitive, and the reviewing court will accord those findings of fact great deference if entered pursuant to Trial Rule 52(A).

In *Menard*, the trial court had before it evidence of the other actions of the president, his role on the board, his negotiations with Menard, and the president’s written acknowledgment that he was authorized to act. Against this evidence, the trial court also had evidence that the Board had previously rejected Menard’s offer and that the president had told Menard that the Board’s rejection was due to the terms.<sup>29</sup>

The outcome in this case is consistent with the court’s policy of allocating losses to the party most at fault so that the principal who put the agent in a position of trust should bear the loss, but this three-prong test certainly creates some uncertainty in Indiana law.<sup>30</sup> As this test is framed, facts could arise under which the third party could have *actual* knowledge that the agent was not authorized to act based upon direct experience with the corporation, but the court could find the agent’s actions to the contrary lead the third party to reasonably believe that the agent was authorized to act.

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24. *Id.* at 1214 n.8.

25. *Id.* at 1213 n.6.

26. *Id.* at 1215.

27. *Id.* at 1216 n.10.

28. *See id.* at 1216.

29. *See id.* at 1209-10.

30. *See id.* at 1217 (Shepard, C.J., dissenting) (“I think today’s decision will leave most corporate lawyers wondering what the law actually is.”).



## II. INSURANCE CONTRACTS

During the survey period, Indiana courts considered a number of issues within the insurance context, including an issue of first impression—notice of cancellation of an endorsement.

### A. Notice Requirements

In *Westfield Cos. v. Rován, Inc.*,<sup>31</sup> Robinson, the son of Rován's president, was involved in an automobile accident while driving a vehicle leased from Rován. Over a period of several years, Robinson leased vehicles through Rován and insured them through Westfield. As each new vehicle was leased, Westfield was informed and asked to substitute the vehicle on the policy. At some point during the period of the policy arrangement, the vehicle was substituted, but the "Lessor Endorsement" was dropped from the policy. Days before the accident at issue in this case, Robinson entered a new lease agreement and Westfield was informed of the change. The issue on appeal was the coverage provided by the lessor endorsement included in the policy at the request of Rován for the benefit of Robinson. Rován argued that the endorsement would have covered Robinson had it not been deleted by Westfield and that Westfield was not entitled to judgment because it failed to provide notice of the cancellation of the policy under the policy's terms.<sup>32</sup>

In order to resolve the dispute, the court interpreted the policy. It noted that in considering the interpretation of an insurance contract, ambiguities are construed in favor of the insured because the insurance company "drafts the policy and foists its terms upon the customer. The insurance companies write the policies; we buy their forms or we do not buy insurance."<sup>33</sup> After reviewing the language in the policy, the court concluded that the endorsement covered "any 'leased auto'" and that, had Westfield not deleted the endorsement, it would have covered the vehicle as a replacement for the vehicle described in the policy schedule.<sup>34</sup>

The court then considered the question of the cancellation. Westfield argued that it was not required to provide notice because it did not cancel the policy, but merely modified it at Rován's request. Further, Westfield argued that it satisfied the notice requirement by sending the agency an Amended Common Policy Declaration, which stated that the endorsement was deleted and changed the policy. The court of appeals disagreed with Westfield's argument. First, it found that the deletion of the endorsement effectively canceled coverage available to Robinson because "cancellation occurs whenever a policy provision is amended or deleted so as to discontinue coverage previously available."<sup>35</sup> Next, the court

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31. 722 N.E.2d 851 (Ind. Ct. App. 2000).

32. *See id.* at 854-55.

33. *Id.* at 856 (citing *Meridian Mut. Ins. Co. v. Auto-Owners Ins. Co.*, 698 N.E.2d 770, 773 (Ind. Ct. App. 1998)).

34. *Id.* at 857.

35. *Id.* at 858 (citing *Plumlee v. Monroe Guar. Ins. Co.*, 655 N.E.2d 350, 355 (Ind. Ct. App.



found that Rován's request to substitute the vehicle did not necessitate deleting the endorsement because the endorsement was not vehicle specific. Accordingly the deletion was unilateral and, in fact, canceled coverage. Finally, it concluded that the cancellation required notice. The Amended Common Policy Declaration was not sufficient to provide the required notice.<sup>36</sup>

The question of what kind and how much notice is sufficient to effectively cancel an insurance policy was a question of first impression. The court determined that Westfield was contractually required to provide notice of any cancellation of coverage.<sup>37</sup> Although the court noted that, in the absence of a specific statutory or contractual description of the notice required, any form of notice of cancellation is sufficient, "such notice must positively and unequivocally inform the insured of the insurer's intention that the policy cease to be binding."<sup>38</sup> The court agreed with the Supreme Court of Appeals of West Virginia, which held:

A notice of cancellation of insurance must be clear, definite and certain. While it is not necessary that the notice be in any particular form, it must contain such a clear expression of intent to cancel the policy that the intent to cancel would be apparent to the ordinary person. All ambiguities in the notice will be resolved in favor of the insured.<sup>39</sup>

The relevant portion of the notice sent by Westfield showed only that it had "DELETED FORM CA2001 07/97."<sup>40</sup> The court found this language "decidedly cryptic and completely uninformative. All it expresses is that one out of some forty-two forms contained in the Policy had been deleted. It does not suggest the importance or practical consequences of this deletion by positively and unequivocally" notifying Rován that the lessor endorsement no longer applied.<sup>41</sup> Because the policy was over one hundred pages long, with roughly forty-two separately numbered forms, and a person would be required to review the entire document to determine which form had been deleted, the court rejected Westfield's argument that a reasonable person could determine that cancellation had occurred.<sup>42</sup>

Under other circumstances, insureds also have notice obligations. In *Gallant Insurance Co. v. Allstate Insurance Co.*,<sup>43</sup> Gallant claimed it was not liable under the insurance policy because it received no notice of a lawsuit against its insured. Two days after an automobile accident, Gallant's insured informed Gallant of the

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1995)).

36. *See id.* at 857-59.

37. *See id.* at 858.

38. *Id.*

39. *Id.* (quoting *Connecticut v. Motorist Mut. Ins. Co.*, 439 S.E.2d 418, 421-22 (W. Va. 1993)).

40. *Id.* at 859.

41. *Id.*

42. *See id.*

43. 723 N.E.2d 452 (Ind. Ct. App. 2000).



accident. Allstate's insured filed suit, and Gallant provided counsel to its insured. The parties reached a settlement, and Gallant paid Allstate's insured in exchange for a release. Allstate paid its insured on a property damage claim, then filed suit on its subrogation claim against Gallant's insured in a different county. Gallant's insured was served at her residence, but Allstate did not send a copy of the complaint to Gallant or to counsel who had represented the insured. The insured neither answered nor sent the complaint to her counsel or Gallant. While the parties were negotiating the property damage claim, Allstate sought default judgment against Gallant's insured and mailed a copy of the subrogation claim to Gallant. Once default was entered, Allstate moved for proceedings supplemental and listed Gallant as a garnishee defendant.<sup>44</sup> The policy required that

[i]f claim is made or suit is brought against the insured, he shall immediately forward to the company every demand, notice, summons or other process received by him . . . .

The company will not be obligated to pay . . . unless the company received actual notice of a lawsuit before a judgment had been entered in said suit.<sup>45</sup>

The trial court found that Gallant had notice of the claim. Actual notice, however, means "notice sufficient to permit the insurer to locate the suit and defend it."<sup>46</sup> "Knowledge of a pending claim or that a lawsuit might be filed is not equivalent to the actual notice that a suit has been filed [as] required under the policy."<sup>47</sup> Further, the court held that Gallant's participation in settlement negotiations regarding the property damage issues did not constitute a waiver of notice.<sup>48</sup>

The court also noted that Allstate was not an "innocent victim" because it knew of Gallant's duty to defend the insured yet failed to notify either the insured's counsel or Gallant of the subrogation lawsuit. Quoting *Smith v. Johnston*,<sup>49</sup> the court noted that "[t]he administration of justice requires that parties and their known lawyers be given notice of a lawsuit prior to seeking a default judgment."<sup>50</sup> Finding that the insured was not entitled to coverage because she failed to provide the required notice and that Allstate's rights were derivative of the insured's, the court reversed the garnishment order and found Gallant not liable to indemnify its insured.<sup>51</sup>

While not at issue on this appeal, the result of this determination is to hold the insured responsible for her failure to notify her insurance company of a

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44. See *id.* at 454.

45. *Id.* at 455.

46. *Id.*

47. *Id.* at 456.

48. See *id.*

49. 711 N.E.2d 1259 (Ind. 1999).

50. *Gallant*, 723 N.E.2d at 456.

51. See *id.* at 456-57.



lawsuit when she had already notified them, and they had defended her, in related matters. It is possible that, on the facts in this case, the insured reasonably believed that her counsel and Gallant also received copies of the materials and that further notice by her was unnecessary. In *Smith v. Johnston*, the court set aside a default despite the defendant doctor's failure to answer because plaintiff's counsel, aware that the doctor was represented by an attorney in a related matter, failed to serve the attorney with at least a courtesy copy of the complaint.<sup>52</sup> If the insured in this case stood to suffer personally from the failure to indemnify, one wonders if an argument similar to the one made in *Smith* might be available to the insured to protect her from her own negligence.

Similarly, in *Askren Hub States Pest Control Services, Inc. v. Zurich Insurance Co.*,<sup>53</sup> an insured exterminator sought coverage under its commercial general liability (CGL) policy after the insurer denied coverage. In this case, the exterminator negligently advised a customer that there was no evidence of termite damage, but after the buyer purchased the home, termites were discovered. The exterminator conducted another inspection and discovered the error, but did not advise its insurance carrier. The court found the facts demonstrated "property damage" that resulted from an "occurrence" as defined in the policy. It disagreed with the exterminator's claim that it had provided reasonable notice to the CGL insurer.<sup>54</sup>

Several forms made up the CGL policy, and more than one notice provision was attached to the separate forms. The pest control form required prompt notice of an occurrence that might result in a claim, with such notice explaining how, when, and where the occurrence took place. It separately required prompt written notice of a claim or action against the insured and required that copies of all legal papers connected with any claim be forwarded to the insurer.<sup>55</sup>

The court noted that notice provisions are "material, and of the essence of the contract"<sup>56</sup> and that "the duty to notify an insurance company is a condition precedent to the insurer's liability."<sup>57</sup> Further, the failure to comply with notice provisions resulting in unreasonable delay "triggers a presumption of prejudice to the insurer's ability to prepare an adequate defense."<sup>58</sup> The court then concluded that the exterminator's failure to give notice of the occurrence for six months was unreasonable, but determined that failure to give reasonable notice would not bar recovery unless the insurer suffered prejudice because of the delay. Because of the presumption of prejudice to the insurer, the insured has the burden of setting forth evidence that shows prejudice did not actually occur. Once such evidence is set forth, the question of prejudice goes to a trier of fact

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52. See *Smith*, 711 N.E.2d at 1261-63.

53. 721 N.E.2d 270 (Ind. Ct. App. 1999).

54. See *id.* at 278-79.

55. See *id.*

56. *Id.* at 277 (quoting *London Guarantee & Accident Co. v. Siwy*, 66 N.E. 481, 482 (Ind. App. 1903)).

57. *Id.* (citing *Shelter Mut. Ins. Co. v. Barron*, 615 N.E.2d 503, 507 (Ind. Ct. App. 1993)).

58. *Id.* at 278 (citing *Miller v. Dilts*, 463 N.E.2d 257, 265 (Ind. 1984)).



and both parties may submit evidence.<sup>59</sup>

The court ultimately found the insurer was prejudiced because language in the policy only covered certain types of damage which arose after the date of the occurrence. The exterminator, without notifying the insurer, made repairs that prevented the insurer from later determining which damage was pre-existing and which occurred after, and as a result of, the exterminator's actions. Accordingly, the insurer was not obligated to cover the occurrence.<sup>60</sup>

In *Paint Shuttle, Inc. v. Continental Casualty Co.*,<sup>61</sup> the court addressed the difference between "claims made" and "occurrence" insurance policies, noting that this distinction has not previously been addressed in Indiana but that other jurisdictions have found it important. Here, the appellate court considered whether a law firm's notice to its professional liability insurance company of a malpractice suit was effective under the provisions of the firm's "claims made" legal liability insurance policy.<sup>62</sup>

Continental Casualty Company (Continental) issued a professional liability policy (malpractice policy) to the law firm of Bosch & Banasiak (firm) for the term of November 29, 1993 through November 29, 1994. During this period, Jacqueline and Peter Miller retained the firm to assist them in the licensing of their business, Paint Shuttle. On March 23, 1994, Paint Shuttle filed suit against the firm for negligence in the rendering of, or in the failure to render, professional legal services relating to such licensing. Although the firm alleges that it orally notified the insurance broker of the suit within the policy period, the firm did not provide written notice of such suit until almost two years after the policy had lapsed. On October 7, 1996, the firm filed a declaratory action against Continental and Paint Shuttle for relief under the malpractice policy. Continental filed an answer, counterclaim and third party complaint for declaratory relief under the malpractice policy. Thereafter, Continental filed a motion for summary judgment on the complaint, third party complaint, and counterclaim, which the trial court granted. This appeal followed the trial court's granting of Continental's motion to correct error.<sup>63</sup>

The court began its opinion by analyzing whether the notice provision of the malpractice policy was clear and unambiguous. The pertinent part of the provision required the insured to provide written notice of the wrongful act, the injury or damage which had or could result from the wrongful act and the "circumstances by which [the insured] first became aware of such wrongful act."<sup>64</sup> If such notice was provided, the policy stated that any subsequent claim made against the insured arising out of such wrongful act would be deemed to have been made during the policy term or extended reporting period. In determining that the provision was unambiguous, the court stated that the firm's

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59. *See id.* at 278-79.

60. *See id.* at 280.

61. 733 N.E.2d 513 (Ind. Ct. App. 2000).

62. *See id.* at 520-22.

63. *See id.* at 517-18.

64. *Id.* at 519.



duty to provide written notice to Continental of a claim during the policy period was a condition precedent to Continental's providing coverage under the policy.<sup>65</sup>

As in *Askren Hub*, the court of appeals held that the notice requirement is "material, and of the essence of the contract."<sup>66</sup> Furthermore, the duty to notify an insurance company of potential liability is a condition precedent to the company's liability to its insured. When the facts are not in dispute, what constitutes proper notice is a question of law.<sup>67</sup> The court then stated that

[n]otice is a term of art within the insurance context and sufficient notice by an insured to an insurer involves more than just promptly notifying an insurance company of a claim. Specifically, we believe that notice also encompasses an insurer's right to promptly investigate a claim or to control the defense of a lawsuit with which it might be subjected to liability as an insurer of an insurance policy.<sup>68</sup>

In addition to promoting the insurer's right to a timely investigation, the court held that the notice provision and the "cooperation provision" have the same purpose and effect.<sup>69</sup> The cooperation clause requires that the insured assist the insurance company with its preparation for settlement or trial. Similarly, notice provisions require the insured to assist the insurance company by enabling it to make a timely and adequate investigation during its preparation for trial or settlement. "Therefore, when an insured impedes or prohibits an insurer from investigating or defending a claim, the insured can be found to be in noncompliance with the notice provision of an insurance policy."<sup>70</sup>

"[F]or notice to be proper under an insurance policy it must be: (1) timely as proscribed by the language of the insurance policy; and (2) 'true' in the sense that the insured allows the insurer to exercise its rights of investigation and defense of a claim under the policy."<sup>71</sup> In *Paint Shuttle*, the court found that although the firm provided verbal notice in a timely fashion, the policy required written notice. Thus, the verbal notice was insufficient and deprived Continental of its right to investigate.<sup>72</sup>

Conventional liability insurance policies are "occurrence" policies, which link coverage to the date of the tort, not the suit.<sup>73</sup> "Claims made" policies link coverage to the date of the claim rather than the tort.<sup>74</sup> Thus, "[t]he notice provision of a 'claims made' policy is not simply the part of the insured's duty

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65. *See id.* at 519-20.

66. *Id.* at 520.

67. *See id.*

68. *Id.* at 520-21.

69. *Id.* at 521 (citing *Ind. Ins. Co. v. Williams*, 448 N.E.2d 1233, 1237 (Ind. Ct. App. 1983)).

70. *Id.*

71. *Id.*

72. *See id.*

73. *See id.* at 522.

74. *See id.*



to cooperate, it defines the limits of the insurer's obligation."<sup>75</sup> In *Paint Shuttle*, the firm held a "claims made" policy. Accordingly, in order for coverage to be in place, the wrongful act must have occurred during the policy period, a claim must have been made and written notice of the claim have been provided to Continental in order for coverage to be in place.<sup>76</sup> The court determined that because "consideration is an essential element of every contract," that also requires a "bargained for exchange," extending the notice period in a "claims made" policy would create an "unbargained for expansion of coverage."<sup>77</sup>

The message of *Rovan* and *Gallant* appears to be that whether you are an insurance company or an insured, you must assure that notice is timely and clear. In order to cancel any portion of a policy, the insurance company must provide clear and definite language, readily accessible to a reasonable person. Simple reference to the canceled or deleted portions may not be sufficient if there is any ambiguity in the eyes of a reasonable person as to what effect a deletion or cancellation might have. In the context of duty to defend, at least as described in the language of the policy, the insured must provide clear and definite notice for any claim, even claims related to actions that the insurance company has already defended. *Askren Hub* puts into perspective the risks of the insured who fails to give notice as required, by raising a rebuttable presumption of prejudice to protect the insurer from responsibility for the insured's actions taken between his/her awareness of an occurrence and his notice to his insurer. Also, in *Paint Shuttle*, when the insured fails to give timely notice to the insurer of potential liabilities, the insurer is deprived of the valuable opportunity to investigate claims and prepare its defense.

### B. Limitations Periods

In *United Technologies Automotive Systems, Inc. v. Affiliated FM Insurance Co.*,<sup>78</sup> a manufacturing company brought an action against a property insurer seeking coverage of damages resulting from environmental contamination. The insurance policy required that a suit or action on the policy be commenced "within twelve (12) months next after the happening of the loss, unless a longer period of time is provided by applicable statute."<sup>79</sup> The manufacturer argued that the contractual limitations period did not bar its claim for coverage because Indiana's general statute of limitations for contract actions based upon written contracts entered before September 1, 1982, is twenty (20) years after the action accrues. In this case, the policy provided coverage for losses within the policy period of December 1, 1971 to December 1, 1974. Accordingly, even if a twenty year statute of limitations was followed, the claim would have been untimely because it was not filed until May 21, 1998, more than twenty years after the

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75. *Id.*

76. *See id.* at 522-23.

77. *Id.* at 523.

78. 725 N.E.2d 871 (Ind. Ct. App. 2000).

79. *Id.* at 873-74.



latest possible cutoff. If a twelve-month limitation from the date the injury occurred was used, the injury would have had to occur no earlier than May 21, 1997. In either case, the limitation period in the contract had long expired before suit was filed.<sup>80</sup>

Although not essential to the holding, the court noted that Indiana does not toll a contractual period of limitations until discovery, but rather holds that the period of limitations begins to run when the loss occurs, regardless of whether the insured knew about it. Giving the manufacturer the benefit of the doubt, the court noted that it had to have "discovered" the loss no later than 1995 when it settled claims brought against it under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).<sup>81</sup>

In light of the substantial work that undoubtedly was undertaken as part of the CERCLA defense, it is unclear why the manufacturer would wait three more years to seek insurance indemnification. The inspections and cleanup took place over several years, from at least 1989 to 1995, before litigation was commenced.<sup>82</sup> Further, the facts recited in the case demonstrate that the real property where the contamination occurred was transferred as part of corporate change and acquisition, but the facts do not explain what, if any, subsequent coverage was available, when the contamination occurred, or why no claim was filed earlier. In light of the probably substantial costs related to the cleanup of the contamination, it is not unreasonable that litigants would seek recovery from whatever party failed to timely file this claim. Although the court was able to resolve this case by finding the claim was untimely under any version of the limitations period, a decision that explained which limitations period applied would have provided guidance to other similarly situated insureds, as well as guiding this manufacturer in determining whether any of its officers, attorneys, or fiduciaries failed in their duties by proceeding at such late date against this insurer.

In *Summers v. Auto-Owners Insurance Co.*,<sup>83</sup> an insured sued his property insurer seeking coverage for a theft loss. After a theft on July 3, 1996, the insured promptly notified the insurer, who sent a theft questionnaire and inventory forms to the insured. A month passed, and the insurer sent a follow-up letter as well as duplicate forms. On September 4, 1996, the insured returned the forms. Two months later, the insurer sent a letter requesting examination of the insured under oath and rejecting the forms as submitted. The insured obtained counsel. The examination under oath occurred, and the insured's attorney challenged a requirement that the insured authorize a release of tax records. On September 3, 1997, the insured's attorney sent correspondence to the insurer regarding discrepancies in the examination. Two weeks later, the insurer notified the insured that his opportunity to comply with terms and conditions of the policy expired on the one-year anniversary of the loss and, as a result, he was barred

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80. See *id.* at 874-75.

81. See *id.*

82. See *id.* at 873.

83. 719 N.E.2d 412 (Ind. Ct. App. 1999).



from further pursuit of the matter.<sup>84</sup>

Summary judgment was granted in favor of the insurer based upon the contractual limitations period, and the insured appealed. The court noted that, while not favored, contractual limitations shortening the time to commence suit are valid so long as a reasonable time is afforded. The purpose of the provision is to avoid unreasonable delay in enforcing the claim; that is, it protects insurers from those who do not voice a claim until beyond the one-year period. Such limitations provisions may be waived, expressly or impliedly, and waiver may result if the insurer's acts create a reasonable belief on the part of the insured that strict compliance with the policy provision will not be required. If the insurer fosters such a belief, it may not later raise the limitation as a defense.<sup>85</sup>

On the facts, the court concluded that the insurer did not expressly waive the limitation. Moreover, the court concluded that the insured failed to comply with the requirements of the policy during the one-year period. The policy required the insured to be in full compliance in order to bring suit. Finally, the court concluded that the insurer was not waiving any of the requirements, but rather was trying to enforce them during the year. On this third conclusion, the court explained that the law does not require the insurer to inform the insured of his responsibilities under the contract or to assert its intention to rely upon a limitation provision as a defense. If the insurer proceeds to negotiate settlement, however, the law will imply a waiver of the contractual limitation. In this case, the insurer did not reach the point of settlement negotiations. The court concluded that the insured failed to demonstrate that the summary judgment was erroneous and affirmed the trial court's judgment.<sup>86</sup>

### *C. Terms Defining Coverage*

The Indiana Supreme Court, finding language in an insurance policy to be ambiguous on its face, construed a builder's risk policy in favor of the insured in *Bosecker v. Westfield Insurance Co.*<sup>87</sup> The Boseckers sold an apartment building, but reacquired it a year later when the purchaser was unable to make payments under the conditional sales contract. They immediately contacted Westfield, their regular insurance company, about coverage and, after some disclosures and discussion with Westfield, the property was added as an endorsement to an existing builder's risk policy. Approximately ten hours after the property was added to the policy, at 2:00 in the morning, the building was destroyed in a fire. Westfield denied coverage based upon a clause defining "Property Not Covered," apparently on the assumption that "improvements, alterations, repairs, or additions were being made."<sup>88</sup> On summary judgment, Westfield argued that the property was not "Covered Property" because the

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84. *See id.* at 414.

85. *See id.* at 414-15.

86. *See id.* at 416-17.

87. 724 N.E.2d 241 (Ind. 2000).

88. *Id.* at 243.



Boseckers had not begun repairs.<sup>89</sup>

The two provisions at issue, "Covered Property" and "Property Not Covered," suggest on the policy's face that the same property can be both covered and not covered if it is under repair. Westfield argued that "Property Not Covered" is defined to be buildings other than new construction. Under this definition, only the improvements and additions are covered, not the pre-existing building. In contrast, the "Covered Property" provision includes "buildings or structures including foundations while in the course of construction, installation, reconstruction, or repair."<sup>90</sup> Considering this seeming inconsistency, the court found the contract ambiguous and determined that it must be construed to afford coverage.<sup>91</sup> To require either two separate policies to cover the time between obtaining the building and beginning construction or requiring construction concurrent with obtaining the property in order to trigger coverage would be "unnecessarily cumbersome and artificial."<sup>92</sup> Explaining the reasoning behind construing ambiguities against the insurer, the court quoted a 1905 opinion, *Glens Falls Insurance Co. v. Michael*,<sup>93</sup> addressing the unequal bargaining power of the parties:

Insurance policies are prepared in advance by insurance and legal experts, having in view primarily the safeguarding of the interests of the insurer against every possible contingency. The insurer not only fully knows the contents of the writing, but also adequately comprehends its legal effect. The insured has no voice in fixing or framing the terms of the [policy], but must accept it as prepared and tendered, usually without any knowledge of its contents, and often without ability to comprehend the legal significance of its provisions.<sup>94</sup>

The court concluded that if Westfield had intended to differentiate between coverage of unoccupied buildings being held for repairs and buildings in which repairs commence immediately, it should have set those terms out clearly. Absent that, the risk was upon the insurer as drafter of the ambiguous terms.<sup>95</sup>

### III. SETTLEMENT AGREEMENTS

#### A. Confidentiality of Negotiations

There was a great deal of judicial discussion of the enforceability of settlement agreements during the survey period. Most significantly, the Indiana Supreme Court addressed the admissibility of evidence of an alleged oral

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89. *See id.* at 242-43.

90. *Id.* at 243.

91. *See id.* at 244.

92. *Id.* at 245.

93. 74 N.E. 964, 969 (Ind. 1905).

94. *Bosecker*, 724 N.E.2d at 244.

95. *See id.* at 245.



settlement agreement reached in a mediation held under the Indiana Alternative Dispute Resolution Rules in *Vernon v. Acton*.<sup>96</sup> In *Vernon*, the parties engaged in pre-suit mediation regarding injuries suffered in an automobile accident. After the mediation, Acton tendered a check and a release form for settlement, but the Vernons returned the check and the unsigned release and filed suit. Acton counterclaimed for breach of the oral settlement agreement and attorney fees. The trial court heard evidence proffered by Acton that the agreement had been reached, including testimony by the mediator, but refused the Vernons' evidence that an offer had been made, but not accepted. The Vernons appealed, claiming the trial court erroneously admitted evidence in contravention of the parties' confidentiality agreement, and Acton asserted that evidence of the final resolution was admissible, but evidence of the events leading up to it were not.<sup>97</sup>

As a pre-suit mediation, the A.D.R. Rules generally would not apply,<sup>98</sup> but the agreement to mediate and the rules for the mediation expressly incorporated the A.D.R. Rules.<sup>99</sup> The A.D.R. Rule then applicable was Rule 2.12, which provided:

Mediation shall be regarded as settlement negotiations. Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in the course of mediation is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of the mediation process. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, or negating a contention of undue delay. Mediation meetings shall be closed to all persons other than the parties of record, their legal representatives, and other invited persons. Mediators shall not be subject to process requiring the disclosure of any matter discussed during the mediation, but rather, such matter shall be considered confidential and privileged in nature. The confidentiality requirement may not be waived by the parties, and an objection to the obtaining of testimony or physical evidence from mediation may be made by any party or by the

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96. 732 N.E.2d 805 (Ind. 2000).

97. *See id.* at 806.

98. The A.D.R. Rules apply only to "all civil and domestic relations litigation filed" in Indiana trial courts. *See* IND. ALTERNATIVE DISPUTE RESOLUTION RULE 1.4. Note, however, that the supreme court has approved Pre-Suit Mediation Guidelines developed by the Indiana State Bar Association which encourages parties to enter private agreements to assure the confidentiality of pre-suit mediations similar to the protections of the A.D.R. Rules.

99. *See Vernon*, 732 N.E.2d at 807.



mediators.<sup>100</sup>

This Rule was amended, effective March 1, 1997, however, to state that “Mediation shall be regarded as settlement negotiations as governed by Ind. Evidence Rule 408,” which language had been included directly in the old rule.<sup>101</sup> Although the Rule declared that “[e]vidence of conduct or statements made in the course of mediation is . . . not admissible,” it did not exclude “any evidence otherwise discoverable merely because it is presented in the course of the mediation process . . . [and] does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, or negating a contention of undue delay.”<sup>102</sup>

The court explained that, generally, settlement agreements need not be in writing to be enforceable, but the mediation rules require the agreement to be reduced to writing and signed.<sup>103</sup> After reviewing the notes to the proposed Uniform Mediation Act under consideration by the National Conference of Commissioners on Uniform State Laws, the court concluded that the enforcement of oral settlement agreements is not a sufficient ground to satisfy the “offered for another purpose” exception to confidentiality under Indiana Evidence Rule 408.<sup>104</sup> Moreover, in weighing the objectives of mediation, the court concluded that “[t]hese objectives are fostered by disfavoring oral agreements, about which the parties are more likely to have misunderstandings and disagreements,” and mediation is more likely to remain a viable avenue for resolving disputes if a written agreement is required.<sup>105</sup> Accordingly, the court reversed the entry of judgment on the oral settlement agreement.<sup>106</sup>

### *B. Property Settlement*

The court of appeals addressed the issue of third party beneficiaries to a life insurance policy in the context of a property settlement associated with a divorce proceeding in *Miller v. Partridge*.<sup>107</sup> In this case, the father and mother divorced when their daughter was fifteen years old. One term of the property settlement agreement required the father to maintain, at all times, a life insurance policy “in an amount equal to or greater than Fifty Thousand Dollars (\$50,000)” and to

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100. See *id.* at 808 (quoting A.D.R. RULE 2.12) (emphasis deleted).

101. *Id.* at 809.

102. *Id.* (quoting A.D.R. RULE 2.12).

103. See *id.* In reaching this conclusion, the court noted a court of appeals decision, *Silkey v. Investors Diversified Service Inc.*, 690 N.E.2d 329 (Ind. Ct. App. 1997), in which the parties acknowledged that an agreement was reached, but disagreed as to whether it was enforceable. The supreme court concluded that, to the extent *Silkey* suggests that oral settlement agreements are not subject to the confidentiality rules, it is disapproved. See *Vernon*, 732 N.E.2d at 810 n.8.

104. *Vernon*, 732 N.E.2d at 810.

105. *Id.*

106. See *id.* at 806.

107. 734 N.E.2d 1061 (Ind. Ct. App. 2000).



name the daughter as beneficiary.<sup>108</sup> At the time of the property settlement and divorce, the father had three policies in force, with a total benefit equaling \$50,000, that named the mother as beneficiary. The father later changed the beneficiary on his policies, but instead of naming his daughter as the property settlement required, he named his girlfriend. The policies then remained unchanged until his death, at which time the benefits had increased in value to \$62,000. The girlfriend appealed the trial court's summary judgment and order granting the daughter the proceeds of the father's life insurance policy, and the daughter appealed the trial court's grant of the girlfriend's motion to correct error which reduced the daughter's award from \$62,500 to \$50,000.<sup>109</sup>

Initially, the court analyzed whether the daughter was a third party beneficiary to the insurance policy. Since property settlement agreements are binding contracts, "[p]arties are free to divide their property in any way they choose and their agreement in that regard is interpreted as any other contract."<sup>110</sup> Accordingly, the general rules of contract interpretation governed this property settlement agreement.

Generally, only a party to the contract or one in privity with a party to a contract has rights under that contract. However, one not a party to the contract may directly enforce the contract as a third party beneficiary if: (1) the parties intend to benefit a third party; (2) the contract imposes a duty on one of the parties in favor of the third party; and (3) the performance of the terms of the contract renders a direct benefit to the third party.<sup>111</sup>

The court found that the property settlement agreement in this case showed ample evidence that the daughter was a third party beneficiary, despite the fact that she had not been named beneficiary of the insurance policies. Accordingly, the court determined that judicially altering the beneficiary from the girlfriend to the daughter was an appropriate remedy.<sup>112</sup>

The girlfriend argued that whatever rights the daughter had, these rights terminated when she reached the age of majority. She based this argument on cases that held that trial courts are prohibited from distributing marital property to children and are only able to create such an obligation as a form of child support. The court identified the critical distinction between an obligation arising from a property settlement agreement, as in this case, and a court order. "When the court orders, as a part of a divorce decree, that a parent is to designate a child as beneficiary of a life insurance policy, the court is making an order of child support by protecting the support in the event of the supporting parent's death."<sup>113</sup> However, parties are able to include provisions in property settlement

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108. *Id.* at 1063.

109. *See id.* at 1063-64.

110. *Id.* at 1064 (quoting *Kiltz v. Kiltz*, 708 N.E.2d 600, 602 (Ind. Ct. App. 1999)).

111. *Id.* (quoting *Kiltz*, 708 N.E.2d at 602) (internal citations omitted).

112. *See id.*

113. *Id.* at 1065 (citing *Capehart v. Capehart*, 705 N.E.2d 533 (Ind. Ct. App. 1999)).



agreements, such as an insurance obligation benefitting children, which achieve what the court cannot. Accordingly, the court found no reason to treat the obligation of the father to name the daughter as beneficiary to his insurance policies differently than other marital property. Furthermore, the court found that because the provision for the daughter was a contractual obligation and not child support, the daughter's age was only relevant if the contract made it so.<sup>114</sup>

The case's final issue concerned whether the daughter was entitled to recover the full amount of the insurance proceeds or whether her award should be reduced to the \$50,000 as indicated in the settlement agreement. The daughter argued she was entitled to the full amount because the settlement agreement anticipated either an increase in the value of the proceeds or, if needed, the purchase of additional life insurance. The trial court awarded the daughter \$50,000 after finding that the specific use of the disjunctive conjunction, "in an amount *equal or greater* than \$50,000 dollars," meant that \$50,000 was the minimum.<sup>115</sup> The appellate court found that this strict interpretation was not an abuse of discretion.<sup>116</sup>

Finally, the court offered drafting advice when attempting to create a parental obligation to buy life insurance for the benefit of a child. As these provisions are commonly intended to protect child support in the event the support-paying parent dies, it is important for the parties to understand the need to clearly identify the intent of such provisions. The court reminded drafters that courts will not speculate about intent and will not look outside the four corners of the document. In this case, it was clear and unambiguous that the parties intended for the daughter's benefit to extend beyond emancipation by inclusion of the term "at all times."<sup>117</sup>

In *Niccum v. Niccum*,<sup>118</sup> the court considered the terms of a settlement agreement dissolving a marriage. The agreement provided that the funds would be divided equally, which it interpreted as "having the same privileges, status, or rights; deserving or worthy: equal before the law."<sup>119</sup> The property to be divided included a benefit plan and a savings and investment program. Disagreeing with the trial court, the court concluded that, absent express language to the contrary, "the settlement agreement implicitly contemplated both parties sharing all of the rewards and risks associated with the investment plan."<sup>120</sup> The court held that the valuation date established in the settlement agreement controlled the base amount to which growth is added or loss subtracted and barred the spouse from benefitting from contributions made by the other spouse after the valuation date.<sup>121</sup>

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114. *See id.*

115. *Id.* at 1065-66 (emphasis in original).

116. *See id.* at 1066.

117. *See id.* at 1065.

118. 734 N.E.2d 657 (Ind. Ct. App. 2000).

119. *Id.* at 640.

120. *Id.*

121. *See id.*



### C. *Fraud in Inducing Settlement*

In *Indiana Insurance Co. v. Margotte*,<sup>122</sup> the court of appeals considered the effect of attorney fraud in the context of settlement agreements. The Margottes were represented by their attorney, Bradley J. Catt, in negotiations for settlement of their claims of injuries suffered in an automobile accident. Catt gave the Margottes a settlement agreement to sign, and they signed it without reading it and without knowledge that it was a settlement agreement. After the Margottes signed the agreement, Catt returned it to Indiana Insurance, and Indiana Insurance issued a check jointly payable to Catt and the Margottes in the amount of \$400,000. Catt received the check, signed his name, forged the Margottes' signatures, deposited it into his attorney trust account, and embezzled the funds for his personal use. The Margottes received none of the money and subsequently sued Indiana Insurance alleging breach of the settlement agreement.<sup>123</sup>

The court of appeals initially found the settlement agreement voidable for fraud in the execution because Catt misrepresented its contents to the Margottes in order to induce their signature. The court acknowledged that the parties did not dispute that the Margottes did not know the content of the document, but noted that when a party is negligent in reading the contents of a contract, the contract is voidable, not void.<sup>124</sup> When a contract is voidable for fraud, the injured party may either seek to avoid the contract or stand on the contract and seek damages. Because the Margottes sought the benefits of the contract, the court concluded it was a binding contract.<sup>125</sup>

The court next found that Indiana Insurance had performed as required under the agreement. It had sent a check jointly payable to Catt and the Margottes to the address specified in the agreement in the amount required, and there were sufficient funds to cover the check. Once the check was paid, it extinguished Indiana's debt to the Margottes. Further, Indiana law provides that acceptance of a check by an attorney on behalf of his client amounts to payment of the obligation. Thus, the Margottes were precluded from recovery in large part by their decision to stand by the contract and seek damages.<sup>126</sup>

### IV. AGREEMENTS TO ARBITRATE

Indiana courts may not order parties into arbitration unless the parties have agreed by private contract to arbitrate their disputes.<sup>127</sup> In *Mid-America Surgery*

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122. 718 N.E.2d 1226 (Ind. Ct. App. 1999).

123. *See id.* at 1227-28.

124. *See id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 163 cmt. c (1981)).

125. *See id.*

126. *See id.* at 1229-30.

127. *See Int'l Creative Mgmt., Inc. v. DAR Entm't Co.*, 670 N.E.2d 1305, 1311 (Ind. Ct. App. 1996).



*Center, L.L.C. v. Schooler*,<sup>128</sup> the Schoolers resigned from the corporation, which was an event of dissociation under the limited liability corporation agreement, and which the Schoolers believed required Mid-America to purchase their interest within ninety days. When Mid-America failed to purchase the interest, the Schoolers filed suit and Mid-America moved to compel arbitration under the agreement. The Schoolers resisted arbitration and argued that the arbitration clause was unenforceable due to Mid-America's prior breach.<sup>129</sup>

A court considering a motion to compel or stay arbitration must first determine whether the parties have agreed to arbitrate the particular dispute and, if it concludes they have, the court is required by statute to compel arbitration. Here, the court noted that the parties' agreement specifically provided that any claim, including a claim of breach of the agreement, "shall be submitted to arbitration."<sup>130</sup> Further, the court noted that

the very purpose of arbitration provisions would be defeated and their effectiveness severely limited if a party were held to have abandoned his arbitration rights merely because his actions might be construed to constitute a breach of the contract prior to the time he seeks a clarification of those rights through arbitration.<sup>131</sup>

Despite this, arbitration may be waived by express acts or implied by the acts, omissions or conduct of the parties. Although the facts in this case demonstrated some delay from the time that the Schoolers informed Mid-America that they would resign to the time Mid-America ultimately sought arbitration, the court concluded the delay alone was insufficient to establish waiver and that the trial court erred in denying Mid-America's application for arbitration.<sup>132</sup>

## V. STATUTE OF FRAUDS AND ORAL AGREEMENTS

Is an oral agreement to form an entity to purchase real estate a valid and enforceable contract? As with many questions in the law, it appears the answer is: "It depends." In *Epperly v. Johnson*,<sup>133</sup> two men entered into an oral agreement to form a partnership to purchase a golf course in Florida. Johnson learned of the golf course for sale, but lacked the money to invest. He contacted Epperly about forming a partnership to purchase the golf course. The two agreed that the partnership would be formed, with Epperly lending Johnson the money for Johnson's share of the down payment. After reaching this agreement, however, Epperly found other partners and purchased the property without Johnson. Johnson sued, alleging breach of contract, fraud and constructive fraud,

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128. 719 N.E.2d 1267 (Ind. Ct. App. 1999).

129. *See id.* at 1269-70.

130. *Id.* at 1270.

131. *Id.*

132. *See id.* at 1270-71.

133. 734 N.E.2d 1066 (Ind. Ct. App. 2000).



and a jury awarded him \$1 million in compensatory damages and \$2 million in punitive damages. Epperly appealed, and the court of appeals affirmed in part and reversed in part.<sup>134</sup>

Epperly argued that there could be no binding contract because Johnson's claim was essentially a claim to be made a limited partner and such an interest cannot be created without a writing. The court determined that, while Epperly went on to form a limited partnership to which Epperly's argument might apply, the contract he had breached was the oral agreement to form a partnership in the future. In resolving the claim of breach of contract, the court of appeals applied the rule set forth in *Wolvos v. Meyer*,<sup>135</sup> which recognized that, in general, an agreement to agree is not enforceable, but parties may make an enforceable contract that binds them to prepare and execute a final agreement.<sup>136</sup>

In order to determine whether an oral agreement is an enforceable contract or a mere agreement to agree, the court considers two questions. "First, did the parties intend to be bound by the agreement or did they intend to be bound only after executing a subsequent written document?"<sup>137</sup> If they intended only to be bound after the written document was executed, no enforceable contract exists until the subsequent document is executed. "Second, did the agreement lack such essential terms as to render it unenforceable?"<sup>138</sup> The agreement must provide "reasonable certainty in the terms and conditions of the promises made, including by whom and to whom."<sup>139</sup> In this case, Johnson had a letter from Johnson's attorney which memorialized the attorney's understanding of the agreement between Johnson and Epperly, including that each would hold a one-third interest and would contribute \$200,000, with Epperly loaning Johnson the money. The oral agreement was subsequently modified to give each a one-fourth share and reduce the contribution to \$150,000. Under the court's standard of review, it could not say there was a "total failure of evidence permitting the jury to find the oral agreement amounted to a binding contract to subsequently execute a partnership agreement."<sup>140</sup>

Epperly next argued that, even if a contract existed, Johnson failed to perform because he never presented a promissory note. However, the court found that the agreement as memorialized in the letter, stated an interest rate and due date for the promissory note, but it did not state when the note would be executed and tendered. Accordingly, because the parties left open the time for the performance, they are presumed to have intended a reasonable time, which is determined by the circumstances. The court declined to hold that, absent a date in the agreement, the failure to present the promissory note necessarily

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134. See *id.* at 1069-70.

135. 668 N.E.2d 671 (Ind. 1996).

136. See *Epperly*, 734 N.E.2d at 1070-71.

137. *Id.* at 1071.

138. *Id.*

139. *Id.*

140. *Id.*



constituted a failure to perform.<sup>141</sup>

*Wallem v. CLS Industries, Inc.*<sup>142</sup> dealt with another prong of the Statute of Frauds which provides that

[n]o action shall be brought . . . upon any agreement that is not to be performed within one (1) year from the making thereof . . . Unless the promise, contract or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith.<sup>143</sup>

In *Wallem*, the parties entered into an oral employment agreement by which Wallem was paid weekly. As a result of a conflict, Wallem agreed to resign from CLS and was offered a resignation bonus. The agreement, entered into September 1, 1994, provided that Wallem would receive weekly payments for one year, starting October 21, 1994. Wallem claimed that CLS breached the oral agreement because it did not make bonus payments under the oral agreement. Further, he claimed that CLS had breached a settlement agreement.<sup>144</sup>

CLS argued that the Statute of Frauds controlled the settlement agreement because the agreement could not be completed in one year. Wallem, relying upon *Silkey v. Investors Diversified Services*,<sup>145</sup> argued that the Statute of Frauds did not preclude recovery because the agreement could be performed within one year. In *Silkey*, the agreement required payment on or before a specific date. Although the date itself was beyond the one year period, on the face of the agreement it was capable of being performed within one year.<sup>146</sup> In contrast, if CLS performed the agreement as specified in its own terms, it would make weekly payments and could not fully perform before the one-year term ended. The court first concluded that there was no agreement reached on the bonus and affirmed summary judgment on the breach of contract claim. The express terms in the CLS agreement made it clear that it was not intended or capable upon its own terms of performance within one year. When, as in this case, the contract is not capable of full performance within one year, the agreement is subject to the Statute of Frauds and is unenforceable.<sup>147</sup>

In another Statute of Frauds case, the court of appeals considered a dispute over property. In *Perkins v. Owens*,<sup>148</sup> three parties purchased land from Stottlemeyer. Two adjoining properties, conveyed to Owens and Leedy, did not include a thirty-foot strip of land ("disputed property") which Stottlemeyer retained to provide access to other land. However, the third purchaser, Perkins, received a contract and deed which included the disputed property. Nearly

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141. See *id.* at 1072.

142. 725 N.E.2d 880 (Ind. Ct. App. 2000).

143. IND. CODE § 32-2-1-1 (1998).

144. See *Wallem*, 725 N.E.2d at 882.

145. 690 N.E.2d 329 (Ind. Ct. App. 1997).

146. See *Wallem*, 725 N.E.2d at 887.

147. See *id.*

148. 721 N.E.2d 289 (Ind. Ct. App. 1999).



twenty years later, Owens and Leedy sued, claiming ownership of the disputed property by adverse possession. Later, they amended the complaint to allege that Perkins' deed was void and that Owens and Leedy received title by an oral agreement with Stottlemeyer. The trial court found that the oral agreements for the sale of land were taken out of the Statute of Frauds by Owens's and Leedy's partial performance.<sup>149</sup>

Under the Statute of Frauds, oral contracts for the sale of real property are voidable, not void, and may be excepted from the Statute of Frauds by partial performance. However, partial payment by itself does not amount to partial performance. Circumstances generally sufficient to invoke the doctrine of partial performance include some combination of several factors: payment of all or part of the purchase price, possession, and lasting and valuable improvements on the land. The court noted that Indiana holds fast to the rationale behind the Statute of Frauds and "strictly adhere[s] to requiring proof of a combination of [the factors]."<sup>150</sup> Moreover, courts require that proof be "clear and definite."<sup>151</sup> Here, the court found the evidence was not sufficient to prove partial performance.<sup>152</sup>

The facts showed that Owens and Leedy each made some improvements in the land, but did not show that the improvements were of a permanent nature. Rather, they were mostly landscaping and temporary structures, such as a utility barn. The court held that improvements bear little weight unless they are of the kind that would not have been made without the oral contract. The court explained that improvements must be referable to the contract such that the improvements would have been improvident in the absence of the contract. Further, the evidence suggested that both Owens and Leedy treated the property in nearly the same manner before the conveyance as after. Having concluded that Owens and Leedy had not shown the oral contracts to be enforceable, the court found that they had no personal stake in the outcome and could not show that they had been or might be injured. Thus, the court held that Owens and Leedy lacked standing to challenge Perkins' deed, and, accordingly, the trial court lacked jurisdiction to hear their claim.<sup>153</sup>

## VI. EXCLUSIVE LISTING AGREEMENTS

In *Rogier v. American Testing & Engineering Corp.*,<sup>154</sup> the appellate court interpreted an exclusive listing agreement to determine whether it in fact was an exclusive right-to-sell or an exclusive agent agreement. Rogier was a marketing consultant who specialized in mergers and acquisitions of architectural, engineering and environmental firms. American Testing and Engineering Corporation ("ATEC"), an environmental engineering firm, entered into an

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149. *See id.* at 291.

150. *Id.* at 292 (quoting *Summerlot v. Summerlot*, 408 N.E.2d 820, 829 (Ind. Ct. App. 1980)).

151. *Id.*

152. *See id.*

153. *See id.* at 293-94.

154. 734 N.E.2d 606 (Ind. Ct. App. 2000).



exclusive listing agreement (“Agreement”) with Rogier whereby ATEC appointed Rogier as its exclusive agent to search for a buyer for ATEC’s business. The Agreement expressly appointed Rogier as ATEC’s exclusive agent and required that all prospective buyers were to send copies of “all correspondence and purchase offers” to both parties.<sup>155</sup> Rogier provided ATEC with a template search agreement, which Rogier would execute with potential buyers. Pursuant to the template agreement, the buyer would pay Rogier’s commission on the date of closing.<sup>156</sup>

After entering into the agreement with Rogier, ATEC waited nearly six years before taking steps to sell its business. At that time Rogier entered into a search agreement with Baker, a large engineering firm that provided for a different payment schedule than the template provided to ATEC. Specifically, instead of Baker paying Rogier’s commission at the closing, the search agreement required Baker to pay Rogier incremental commissions prior to the sale, immediately upon the completion of Rogier’s sales presentation, and upon closing. The initial fee payment was nonrefundable even if the closing never occurred.<sup>157</sup>

Over three years passed before Rogier and ATEC communicated again. However, the record showed that Rogier continued to work under the Agreement, although ATEC was unaware he was doing so. On or about January 21, 1994, Rogier provided ATEC with written notification that Baker was interested in purchasing their firm. Rogier requested that ATEC sign a purchase offer letter, which would authorize Rogier to present ATEC as an acquisition candidate to Baker. After three requests, ATEC finally forwarded such a purchase offer letter on May 5, 1994. The letter stated that ATEC “acknowledged that Baker would be paying Rogier’s commission and . . . that this term be included in Baker’s purchase offer.”<sup>158</sup>

In June and July 1994, Rogier communicated with ATEC to attempt to receive ATEC’s financial statements and other related corporate documents requested by Baker. Due to ATEC’s refusal to provide the necessary financial statements, Rogier was unable to make the sales presentation to Baker. In July 1994, Baker notified Rogier that it was no longer interested in acquiring ATEC.<sup>159</sup>

In mid-1994, ATEC began making contacts with another buyer without informing Rogier. In 1996, ATEC sold its own business without informing Rogier and without the use of another broker. Rogier learned of the sale and filed suit, alleging breach of the parties’ Agreement by refusing to provide the necessary financial information to Baker (which resulted in Rogier’s loss of a multi-million dollar sales presentation fee) and by failing to disclose the sale of its business to another buyer.<sup>160</sup>

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155. *Id.* at 611.

156. *See id.*

157. *See id.* at 612.

158. *Id.*

159. *See id.*

160. *See id.* at 613.



ATEC moved for summary judgment alleging Rogier had no damages and that the Agreement had terminated, was abandoned, or had been waived by Rogier as a matter of law. The trial court entered summary judgment in favor of ATEC, and Rogier appealed. The appellate court affirmed in part, reversed in part and remanded.<sup>161</sup>

1. *Foreseeable Damages.*—The first issue analyzed by the court was whether the damages sustained by Rogier as a result of the loss of commissions pursuant to the Baker search agreement were foreseeable by ATEC. The test for measuring damages in a breach of contract suit is “foreseeability at the time of entry into the contract, not facts existing or known to the parties at the time of the breach.”<sup>162</sup> Damages not contemplated by the parties at the time the contract is entered into are not recoverable.<sup>163</sup>

The court found “that ATEC breached its duty to provide Rogier with the financial documents necessary to make a sales presentation to Baker.”<sup>164</sup> Furthermore, in the purchase offer letter, ATEC authorized Rogier to present ATEC as an acquisition candidate to Baker, and reaffirmed that it would provide Rogier with the materials including the financial statements so that the buyer could make a realistic offer. Despite these factors, the court concluded that any damages arising because of that breach were unforeseeable due to the fact that ATEC had no reason to know that Rogier entered into a customized search agreement that entitled Rogier to a commission irrespective of whether a sale took place. As such, the damages alleged by Rogier resulted from the lost opportunity to make a sales presentation and were not foreseeable by ATEC and therefore unrecoverable.<sup>165</sup>

2. *Exclusive Right.*—The next issue analyzed by this court was ATEC’s argument that the exclusive listing agreement was merely an exclusive agency agreement, not an exclusive right to sell. An exclusive right to sell would have entitled Rogier to a commission even if he were not the “procuring cause” of the sale of ATEC business.<sup>166</sup> The court concluded that this agreement was an exclusive right to sell.

It has long been the rule in Indiana that a broker earns its commission when it . . . procures a buyer ready, willing, and able to purchase the property. Notwithstanding the doctrine of procuring cause, Indiana courts will enforce specific provisions in a listing contract which allow a broker to earn a commission under other circumstances.<sup>167</sup>

Specifically, a broker may be granted the right to a commission regardless of whether the sale was effected by the broker, the owner, or any other third person.

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161. *See id.*

162. *Id.* at 614.

163. *See id.*

164. *Id.* at 614.

165. *See id.*

166. *Id.* at 615.

167. *Id.* (citation omitted).



To determine whether the listing contract created an exclusive agency or an exclusive right to sell, the court referred to a treatise:

An “exclusive agency” agreement, prohibiting the owner from selling property through another broker during the listing period, but permitting the owner to sell property through his own efforts, is distinguishable from an “exclusive right to sell” agreement, prohibiting the owner from selling personally or through another broker without incurring liability for commission to the original broker.<sup>168</sup>

The particular language of the agreement is important to distinguish between exclusive agency and exclusive right to sell agreements. In this case, the parties agreed that Rogier would be “the exclusive agent with an exclusive listing and all prospective buyers shall send copies of all correspondence and purchase offers to [ATEC] and to [Rogier].”<sup>169</sup> Because the court determined that this provision was clear and unambiguous, it found that Rogier was to be involved in all negotiations with all prospective buyers, regardless of how they were procured. Accordingly, the court found that this exclusive listing agreement prohibited ATEC from selling its own business and Rogier was entitled to his commission on such sale.<sup>170</sup>

3. *Enforceability*.—The third issue considered by the court was whether the exclusive listing agreement was unenforceable as a matter of law. ATEC argued that it was “(1) ‘uncertain as to duration and consideration,’ and (2) illusory and lacked mutuality of obligation because it imposed no responsibility on Rogier to perform.”<sup>171</sup> Generally, when a contract is silent about duration, the broker is given a reasonable period of time to accomplish the object of the agency. Contracts without specific endpoints or which specifically indicate they last perpetually, are enforceable and terminable at will by either party. The agreement in question was not terminated by either party and, accordingly, was not unenforceable for lack of a termination date.<sup>172</sup>

Notwithstanding, ATEC argued that Rogier did not perform within a reasonable time. Generally, what constitutes a reasonable time for performance is determined by the trier of fact; however, Indiana courts have held that when the facts are not in dispute, the determination of “reasonable” is a question of law.<sup>173</sup> In this case, the parties had a course of dealing that included elongated “holding patterns,” during which there was no communication, and evidence supported the conclusion that such periods were common in deals involving multi-million dollar businesses such as ATEC. Furthermore, ATEC did not actively solicit buyers for its company for six years after the execution of the agreement. Accordingly, the court refused to hold as a matter of law that the ten

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168. *Id.*

169. *Id.* at 616.

170. *See id.*

171. *Id.*

172. *See id.* at 616-17.

173. *See id.* at 617 n.4.



year period here was unreasonable, and the court consequently found that there was a genuine issue of material fact regarding whether Rogier failed to perform his obligations within a reasonable time.<sup>174</sup>

The court found that it was improper for courts to inquire into the adequacy of consideration, and when the substance of the contract has no determined value, the court will not disturb the determination of the parties as to the sufficiency of the bargain. Furthermore,

[w]hen the broker, in good faith and in compliance with its implied promise to make an effort to sell the property, expends time, energy, and money to find a purchaser or successfully completes the undertaking, there is sufficient consideration for the promise to pay a commission, and the agreement becomes a bilateral and binding contract.<sup>175</sup>

The court held that the exclusive listing agreement was supported by consideration and did not fail for uncertainty.<sup>176</sup>

Additionally, the agreement was not unenforceable for a lack of mutuality because both parties were bound. When one party performs, relying upon the other party's promise, the contract is not unenforceable for lack of mutuality. In this contract, Rogier had obligations to find a buyer, and he had performed to fulfill those obligations. Accordingly, the court found that this contract was not unenforceable as a matter of law for lack of mutuality.<sup>177</sup>

4. *Lapse*.—The court next turned to ATEC's argument that the contract had lapsed. Brokers may only be compensated pursuant to written contract, and such contracts may be revoked through lapse of time. As with the determination of whether Rogier's obligations were performed within a reasonable time, whether the contract was revoked through lapse of time is a question for the trier of fact. Because the parties' course of dealing could lead to more than one inference, the court refused to hold as a matter of law that the contract was unenforceable due to a lapse of time.<sup>178</sup>

5. *Abandonment*.—Similarly, the court remanded the case on the question of whether the contract had been abandoned. "The abandonment of a contract is a matter of intention to be ascertained from the facts and circumstances surrounding the transaction from which the abandonment is claimed to have resulted."<sup>179</sup> Abandonment may be implied from the circumstances and the actions of the parties. A contract will be deemed abandoned when a party's conduct is inconsistent with the existence of a contract and the other party acquiesces to such conduct. The mere passage of time between when the broker has ceased to perform and when the owner makes a sale does not conclusively

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174. See *id.* at 617.

175. *Id.* at 618.

176. See *id.*

177. See *id.*

178. See *id.*

179. *Id.* at 619 (quoting *Baker v. Estate of Seat*, 611 N.E.2d 149, 152 (Ind. Ct. App. 1993)).



establish that the contract was abandoned. What constitutes abandonment is a question of law, but whether there has been abandonment is a question of fact. In this case, the parties' course of dealing included prolonged "holding patterns" in which there was no sales activity or communication between the parties. Thus, the court held that there was a genuine issue of fact as to whether Rogier abandoned the contract.<sup>180</sup>

6. *Waiver*.—Silence and inactivity alone cannot constitute waiver unless there is a duty to speak or act. ATEC argued that Rogier waived his rights under the agreement by failing to communicate with ATEC for long periods of time. The court concluded that, like the determinations of what is reasonable time and abandonment, whether Rogier waived his contractual rights by his prolonged periods of silence is a genuine issue of fact.<sup>181</sup>

7. *Prevention of Performance*.—A breaching party may not be relieved of his duty to perform under the contract. Further, the common law of contracts excuses a party's performance where the other party prevents that performance. Moreover, "a party may not rely on the failure of a condition precedent to excuse performance" when such failure is a result of that party's actions or inaction.<sup>182</sup> In the case of an exclusive right to sell, there is an implied promise by the owner not to obstruct the broker's performance. Despite the Agreement in this case applying to "all buyers," ATEC did not notify Rogier of the potential buyer, which made his performance virtually impossible.<sup>183</sup>

Ultimately, the court held that whether there was a breach of contract was a question of fact and, accordingly, reversed the summary judgment with respect to ATEC's claims of unforeseeability, lapse, abandonment, and waiver precluding judgment as a matter of law.<sup>184</sup>

## VII. REMEDIES

In *Nielson Buick Jeep Eagle Subaru v. Hall*,<sup>185</sup> the court considered the scope of remedies available from a small claims court. The buyer of a used car soon discovered she had a problem. The day after her purchase, she returned the car, and the dealer replaced the starter, performed front and rear brake services, and changed the oil and filter at no cost to the buyer. Over the next five months, she returned the car for service several times under the twelve-month limited vehicle service contract. Finally, the dealer refused to perform under the service contract, and the buyer left the vehicle at the dealership. The buyer brought suit, and the small claims court rescinded the contract, awarded the buyer monetary damages and court costs, and awarded the dealership possession of the car. The

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180. *See id.* at 619-20.

181. *See id.* at 620.

182. *Id.* at 621.

183. *See id.*

184. *See id.*

185. 726 N.E.2d 358 (Ind. Ct. App. 2000).



dealer appealed.<sup>186</sup>

The small claims statute defines the court's jurisdiction based upon the dollar value of the recovery sought.<sup>187</sup> Nothing in the statute authorizes the court to grant the equitable remedy of rescission. Thus, the court of appeals held that the small claims court exceeded its jurisdiction when it granted rescission.<sup>188</sup>

### CONCLUSION

Contracts law in Indiana, while generally stable and predictable, has continued to evolve over the past year. As evidenced by the cases in this survey, there has been no dramatic swing of the pendulum, but rather a steady progression towards defining the parameters of effectuating the parties' intent. Indiana courts refuse to rewrite agreements, but instead afford the parties the freedom to do amongst themselves what courts cannot. While the consistency in Indiana contracts law may afford the practitioner some comfort and expertise, the prudent drafter should be wary of complacency and should take note of the subtle evolution so as to more effectively counsel and protect his clients' interests.

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186. *See id.* at 359-61.

187. *See id.* (citing IND. CODE ANN. § 33-5-2-4 (Supp. 2000)).

188. *See id.* at 360-61.



# RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

JOEL M. SCHUMM\*

This Article will survey developments in the area of criminal law and procedure that were enacted by the 2000 Indiana General Assembly and addressed by the Indiana appellate courts since the last Survey.

## I. LEGISLATIVE ENACTMENTS

### A. *Blood Alcohol Content*

On July 7, 1999, the court of appeals issued its opinion in *Sales v. State*,<sup>1</sup> in which it held that Indiana Code section 9-30-5-1(a)(2), as amended in 1997, was “defective on its face” and would not support a conviction in many instances.<sup>2</sup> That statute provided: “A person who operates a vehicle with at least ten-hundredths percent (0.10%) of alcohol by weight in grams in: . . . (2) two hundred ten (210) liters of the person’s breath; commits a Class C misdemeanor.”<sup>3</sup> The court of appeals observed:

As written, to be convicted under the breath-alcohol provision a person must have .10% by weight of alcohol in grams in 210 liters of his breath. To express the weight of alcohol as a percentage of 210 liters of breath, we would divide the weight in grams of alcohol by 210, then multiply by 100 to obtain a “percentage.”<sup>4</sup>

Applying this formula to *Sales*’ breathalyzer reading of “.14 grams of alcohol per 210 liters of breath” yielded .0667%, which is less than the .10% necessary for a conviction under the statute.<sup>5</sup> Thus, the court of appeals affirmed the trial court’s sua sponte dismissal of that count.<sup>6</sup> In so doing, its ruling also cast grave doubt over the ability of the State to secure convictions (and the validity of those that had been secured since 1997) in thousands of cases under this statute.

In a special session in November 1999, the General Assembly laid at least some of these concerns to rest when it amended the statute to provide “[a] person who operates a vehicle with an alcohol concentration equivalent to at least ten-hundredths (0.10) gram of alcohol per: . . . two hundred ten (210) liters of the person’s breath; commits a Class C misdemeanor.”<sup>7</sup> Although the amendment

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1. 714 N.E.2d 1121 (Ind. Ct. App. 1999), *rev’d*, 723 N.E.2d 416 (Ind. 2000).

2. *Id.* at 1129.

3. *Id.* at 1126.

4. *Id.* at 1128.

5. *Id.*

6. *See id.* at 1129.

7. IND. CODE § 9-30-5-1 (Supp. 2000).



was effective upon passage, it did not—indeed, it could not—do anything about convictions and pending cases that occurred between the 1997 amendment and the 1999 amendment, which continued to be controlled by the court of appeals' interpretation of the statute in *Sales*.

On January 18, 2000, the supreme court granted transfer in *Sales* and on February 7, it issued its opinion reversing the pertinent part of the court of appeals' opinion.<sup>8</sup> The supreme court began by noting that the 1997 amendment created an "inherently ambiguous provision."<sup>9</sup> Nevertheless, the court found the General Assembly's intent to be clear based on the statute as a whole, the usage of "percentage" in scientific circles, the regulations for instruments that measure blood alcohol content, cases on the same subject from other jurisdictions, and common sense.<sup>10</sup> On the latter point, the court noted that there had been a push in recent years to lower the legal blood alcohol level to .08, but no one had ever proposed more than doubling it to .21 as the court of appeals' interpretation of the statute would have required.<sup>11</sup> Accordingly, the court held that prosecutions of cases that occurred between the 1997 amendment and the 1999 correction "may proceed upon proof of operating a vehicle with .10 grams of alcohol in 210 liters of the person's breath."<sup>12</sup>

### B. Venue

In October of 1998, the court of appeals in *Navaretta v. State*<sup>13</sup> reversed convictions for operating a vehicle while intoxicated and other offenses based on improper venue. In *Navaretta*, the defendant was driving east on 96th Street on the northeast side of Indianapolis. After noticing that Navaretta's taillights were not functioning properly, a Hamilton County Sheriff Deputy followed him. Navaretta accelerated his vehicle before crashing into a privacy fence. Navaretta was charged and tried in Hamilton County, but the evidence at trial showed that the eastbound lane of 96th Street in the area in which Navaretta was driving was located in Marion County and the westbound lane was in Hamilton County.

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8. See *Sales v. State*, 723 N.E.2d 416 (Ind. 2000).

9. *Id.* at 419. The court explained:

The statutory language at face value asks for a calculation of the "percent" of a number of grams (a unit of weight) found in a number of liters (a unit of volume). It is, of course, sensible to speak of the number of grams of alcohol found in a given volume of blood or breath. It is not meaningful to speak of a number of grams as a "percent" of a number of liters, at least as "percent" would be understood by one accustomed to dealing with numbers. The two are not qualitatively the same thing and neither is a portion of the other's whole.

*Id.*

10. See *id.* at 420-21.

11. See *id.* at 421.

12. *Id.* at 417.

13. 699 N.E.2d 1207 (Ind. Ct. App. 1998), *rev'd*, 726 N.E.2d 787 (Ind. 2000).



Navaretta was convicted, and on appeal raised the venue issue.<sup>14</sup>

The State relied on Indiana Code section 35-32-2-1(h), which provides: "If an offense is committed at a place which is on or near a common boundary which is shared by two (2) or more counties and it cannot be readily determined where the offense was committed, then the trial may be had in any county sharing the common boundary."<sup>15</sup> However, the court of appeals found the statute inapplicable because it was readily apparent that the offenses were committed in Marion County, albeit near the county line.<sup>16</sup> Accordingly, it reversed Navaretta's convictions.<sup>17</sup>

In response to *Navaretta*, the General Assembly added a subsection to the venue statute in 2000, which provides: "If an offense is committed on a public highway (as defined in IC 9-25-2-4) that runs on and along a common boundary shared by two (2) or more counties, the trial may be held in any county sharing the common boundary."<sup>18</sup> Moreover, as in *Sales*, the supreme court granted transfer shortly after the amendment and reversed the court of appeals' holding, noting:

The record contains evidence that the southern border of Hamilton County may extend up to two feet south of the centerline of 96th Street, which had one eastbound and one westbound lane at the time, we find that substantial evidence was presented to establish that it cannot be readily determined in which county the offense was committed, thus permitting the defendant's trial to occur in Hamilton County or Marion County.<sup>19</sup>

### C. Other Enactments

The General Assembly also passed several other bills that generated little publicity or controversy. The statute of limitations provision of Title 35 was amended to explicitly provide that a prosecution for murder may be commenced at any time regardless of the amount of time that passes between the date a person allegedly commits the elements of the crime and the date the victim actually dies.<sup>20</sup> The public indecency statute was amended to increase the offense from a class A misdemeanor to a class D felony when it is committed in a public park, in or on school property, or in a property owned or managed by the department of natural resources and the defendant has a prior, unrelated public indecency conviction that was entered after June 30, 2000.<sup>21</sup> The battery statute

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14. See *id.* at 1208-09.

15. IND. CODE § 35-32-2-1(h) (1998).

16. See *Navaretta*, 699 N.E.2d at 1209.

17. See *id.*

18. IND. CODE § 35-32-2-1(i) (Supp. 2000).

19. *Navaretta v. State*, 726 N.E.2d 787, 789 (Ind. 2000).

20. See IND. CODE § 35-41-4-2(c) (Supp. 2000).

21. See *id.* § 35-41-4-1(b)(2)-(4).



was amended to provide that battery against a firefighter while the firefighter is engaged in the execution of his or her official duty is a Class A misdemeanor and a Class D felony if it results in bodily injury to the firefighter.<sup>22</sup>

The General Assembly also created a new section criminalizing the knowing or intentional directing of "light amplified by the stimulated emission of radiation that is visible to the human eye or any other electromagnetic radiation from a laser pointer at a public safety officer."<sup>23</sup> The offense is a Class B misdemeanor.<sup>24</sup>

Finally, the code was amended to allow law enforcement officers who have probable cause to believe a person has committed domestic battery to make a warrantless arrest based on an affidavit from an individual with "direct knowledge of the incident."<sup>25</sup> This is an exception to the general requirement that allows a warrantless arrest only when there is probable cause to believe a felony was committed or when a misdemeanor is committed in the officer's presence.

## II. CASE DEVELOPMENTS

### A. Confessions

Just three years ago, the Indiana Supreme Court in *Smith v. State*<sup>26</sup> acknowledged that several of its opinions had applied the wrong standard of review in cases challenging confessions under the United States Constitution.<sup>27</sup> In *Smith*, the court noted that United States Supreme Court precedent dating back to 1972<sup>28</sup> requires that the State prove the voluntariness of a confession only by a preponderance of evidence, not beyond a reasonable doubt as many Indiana cases, purportedly relying on the federal constitution, had required for decades.<sup>29</sup>

The *Smith* opinion cited Professor's Kerr's treatise on Criminal Procedure,<sup>30</sup> which provides a detailed and somewhat critical analysis of the court's inconsistencies on this issue. As Professor Kerr explains, the "beyond a reasonable doubt" standard was initially adopted under "questionable"<sup>31</sup> circumstances in the 1973 opinion of *Burton v. State*,<sup>32</sup> in which the court stated:

The state, according to *Miranda*, has a "heavy burden . . . to demonstrate that the defendant knowingly and intelligently waived his privilege

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22. See *id.* §§ 35-42-2-1(a)(1)(D), 35-42-2-1(a)(2)(K).

23. See *id.* § 35-47-4.5-4.

24. See *id.*

25. *Id.* § 35-33-1-1(a)(5).

26. 689 N.E.2d 1238 (Ind. 1997).

27. See *id.* at 1146 n.11.

28. See *Lego v. Twomey*, 404 U.S. 477, 488-89 (1972).

29. See *Smith*, 689 N.E.2d at 1246 n.11.

30. 16 WILLIAM A. KERR, INDIANA PRACTICE § 7.2g (1991 & Supp. 1997).

31. *Id.* § 7.2g, at 554.

32. 292 N.E.2d 790 (Ind. 1973).



against self incrimination.” We have adopted this standard in past decisions. The issue, therefore, before this Court, is whether the state met its “heavy burden”, i.e., proved beyond a reasonable doubt that the confession was voluntarily given.<sup>33</sup>

As Professor Kerr explained,

The court in this brief paragraph adopted the reasonable doubt standard without any citation of authority or any discussion whatever. In fact, the last few words of the paragraph appear to be included in the opinion almost as an after-thought and as a statement concerning a definition that appeared to be self-evident to the author of the opinion.<sup>34</sup>

In *Smith*, however, the court appeared to resolve the issue, overruling several cases, including *Burton*, which had instituted the “beyond a reasonable doubt” standard under the federal constitution.<sup>35</sup>

In the year after *Smith*, the supreme court reiterated its holding in three cases. First, in *Haak v. State*,<sup>36</sup> the court stated “[w]hen a defendant challenges the voluntariness of a confession under the United States Constitution, the State must prove by a preponderance of the evidence that the confession was voluntarily given.”<sup>37</sup> Next, in *Sauerheber v. State*,<sup>38</sup> the court noted, “[t]he State must prove the voluntariness of a waiver of Miranda rights and the voluntariness of a confession by a preponderance of the evidence.”<sup>39</sup> Finally, in *White v. State*,<sup>40</sup> the court stated “[i]f a defendant challenges the admissibility of his confession on voluntariness grounds, the State must prove by a preponderance of the evidence that the confession was voluntarily given.”<sup>41</sup> The court explained in a footnote that “because defendant did not clearly challenge the admissibility of his confessions under the Indiana Constitution, we will assume that the claim is raised only under the United States Constitution and will analyze it as such.”<sup>42</sup>

Less than five months after the court decided *White*, the supreme court issued *Berry v. State*,<sup>43</sup> in which it stated “[t]he State bears the burden of proving beyond a reasonable doubt that the defendant voluntarily and intelligently waived his rights, and that the defendant’s confession was voluntarily given.”<sup>44</sup> There was no mention of the Indiana Constitution or a retreat from the standard

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33. *Id.* at 797-98 (internal citations omitted).

34. KERR, *supra* note 30, § 7.2g, at 555.

35. *See Smith*. 689 N.E.2d at 1247.

36. 695 N.E.2d 944 (Ind. 1998).

37. *Id.* at 947-48.

38. 698 N.E.2d 796 (Ind. 1998).

39. *Id.* at 803.

40. 699 N.E.2d 630 (Ind. 1998).

41. *Id.* at 633.

42. *Id.* at 633 n.2.

43. 703 N.E.2d 154 (Ind. 1998).

44. *Id.* at 157.



announced in *Smith* and followed in *Haak*, *Sauerheber*, and *White*. Rather, the court merely cited *Owens v. State*,<sup>45</sup> a 1981 case that had not been overruled in *Smith*.

A year and a half later, the court, citing *Berry* and again without mention of *Smith* or the Indiana Constitution, noted in *Schmitt v. State*<sup>46</sup> that "[t]he State bears the burden of proving beyond a reasonable doubt that the defendant voluntarily and intelligently waived his rights, and that the defendant's confession was voluntarily given."<sup>47</sup> Three weeks later, the court reiterated this standard in *Carter v. State*,<sup>48</sup> in which it noted, without citation to any authority, that "[t]he trial court required the State to prove beyond a reasonable doubt that the Defendant voluntarily and intelligently waived his constitutional rights and that his confession was voluntarily given before his statement would be admitted into evidence."<sup>49</sup>

Not until *Luckhart v. State*<sup>50</sup> and *Jackson v. State*,<sup>51</sup> both authored by Justice Rucker and issued on October 5, 2000, did the court provide any type of explanation as to the correct standard. Both opinions cite *Schmitt* and *Carter* and include an identically worded footnote that states:

We note that the federal constitution requires the State to prove only by a preponderance of the evidence that a defendant's confession was voluntarily given. However, in Indiana we require the State to prove the voluntariness of a confession beyond a reasonable doubt, and trial courts are bound to apply this standard when evaluating such claims."<sup>52</sup>

Based on *Luckhart* and *Jackson*, it appears that the issue is now settled. Nevertheless, one is left to wonder on what basis the court has retreated to the "beyond a reasonable" doubt standard. None of the opinions that rely on the "beyond a reasonable doubt" standard mention any provision of the Indiana Constitution, let alone engage in the detailed, exhaustive historical analysis that usually accompanies opinions in which the court holds that the Indiana Constitution offers greater protection than does an analogous provision of the federal constitution.<sup>53</sup> Thus, although the court never says so, it appears to have adopted a higher standard simply as a rule of criminal procedure.

The bottom line, regardless of whether or not one agrees with the court's recent opinions, is that the issue appears to be resolved. When a defendant

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45. 427 N.E.2d 880 (Ind. 1981).

46. 730 N.E.2d 147 (Ind. 2000).

47. *Id.* at 148.

48. 730 N.E.2d 155 (Ind. 2000).

49. *Id.* at 156.

50. 736 N.E.2d 227 (Ind. 2000).

51. 735 N.E.2d 1146 (Ind. 2000).

52. *Luckhart*, 736 N.E.2d at 229 n.1 (internal citations omitted); *Jackson*, 735 N.E.2d at 1153 n.4 (internal citations omitted).

53. See, e.g., *Richardson v. State*, 717 N.E.2d 32, 38-50 (Ind. 1999) (tracing the history of the double jeopardy clause of the Indiana Constitution).



challenges the voluntariness of his confession, the State must prove the voluntariness “beyond a reasonable doubt.” Although trial courts are bound to apply this standard, it probably makes little difference in the typical confession case in which the defendant alleges various sorts of police misconduct but police officers testify otherwise. Such cases require credibility assessments by the trial court, which, regardless of the standard applied, means that most defendants will continue to lose.

Nevertheless, the court’s recent opinions are a potential trap for litigants and even judges who have not thoroughly read and digested the conflicting cases. Indeed, if one were to Shepardize or KeyCite *Smith*, it is good law, as are the cases following it. Moreover, Shepardizing or KeyCiting the cases overruled in *Smith* suggests they are not good law, when in fact they are. Because it does not appear that the court will offer any more of an explanation, overrule, or “un-overrule” any other cases, one can hope that continued application of the what the court has determined to be the proper standard will eventually lead trial courts and litigants to understand and apply the beyond a reasonable doubt standard.

### *B. Jury Deliberations and Return of Verdict*

In *Dickenson v. State*,<sup>54</sup> the court of appeals addressed a claim that a juror lied during voir dire. Dickenson was charged with the attempted murder of Jessie Stinnett. During voir dire the trial court apprised the prospective jurors of the names of the potential witnesses in the case, which included Stinnett’s wife Karen. One prospective juror acknowledged that she had been a childhood neighbor of Dickenson’s and knew a few of the potential witnesses, but maintained that her ability to weigh the testimony of those witnesses would not be affected. In addition, the juror did not respond when the trial court asked if any of the prospective jurors had prior knowledge about the facts of the case. The juror was selected, and Dickenson was convicted.<sup>55</sup>

After trial, Dickenson filed a motion for an evidentiary hearing to determine juror misconduct, alleging that the juror had lied about her relationship with Karen and her pretrial knowledge of the case. Dickenson also filed affidavits from persons who had seen the juror and Karen together or had overheard the two discussing the incident before trial.<sup>56</sup>

At the evidentiary hearing, the juror testified that she knew both Dickenson and Karen but had only a casual relationship with either of them.<sup>57</sup> However, other witnesses, including Dickenson’s two brothers, testified that they had seen the juror and Karen together following the incident but before trial.<sup>58</sup> One witness testified that she had seen the juror and Karen together at a bar “almost

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54. 732 N.E.2d 238 (Ind. Ct. App. 2000).

55. See *id.* at 240.

56. See *id.*

57. See *id.* at 241.

58. See *id.* at 242.



every weekend" and overheard them discussing the incident shortly after it happened.<sup>59</sup> Other witnesses testified that they had seen the juror and Karen together at other bars. The trial court questioned the juror about her answers on voir dire, determined that she did not lie, and denied the motion for a new trial.<sup>60</sup>

The court of appeals noted that, in order to secure a new trial, a defendant alleging juror misconduct must present "specific, substantial evidence showing a juror was possibly biased" and demonstrate that the misconduct was gross and probably harmed the defendant.<sup>61</sup> Based on the evidence presented, the court of appeals concluded that the juror "misrepresented her relationship with Karen when asked about it on voir dire and at the post-verdict evidentiary hearing . . . [and] was not truthful when she failed to affirmatively respond to the court's inquiry on voir dire as to whether any of the potential witnesses had prior knowledge of the case."<sup>62</sup> "[B]ecause the evidence reveals that [the juror] had knowledge of the case prior to trial, and was friendly with the victim's wife, who testified at trial," the court concluded that "the misconduct was gross and probably harmed the defendant."<sup>63</sup> Accordingly, the court reversed and remanded for a new trial.<sup>64</sup>

Judge Vaidik dissented, believing that the case should instead be remanded for an evidentiary hearing at which the trial court would consider whether the juror was biased.<sup>65</sup> The trial court's evidentiary hearing was inadequate because it heard testimony only from the juror, concluded that she was not biased, and then heard testimony from the defense witnesses as part of an offer of proof.<sup>66</sup> Based on the offer of proof testimony and the affidavits filed with the motion, the majority had concluded that the juror was biased and untruthful, a conclusion that Judge Vaidik asserted was reached by "reweigh[ing] the evidence and judg[ing] the credibility of the witnesses . . . . These are functions of a trial court not an appellate court."<sup>67</sup>

Although this issue is an important one, it is fortunately one that does not arise often. When it does, the better course would be to hear from all relevant witnesses and then rule on the issue, making an explicit finding about which ones are credible and which ones are not.

In *Jelks v. State*,<sup>68</sup> the court of appeals addressed the effect of a trial judge engaging in a colloquy with a dissenting juror during polling. According to statute,

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59. *Id.*

60. *See id.* at 240.

61. *See id.* at 241.

62. *Id.* at 242.

63. *Id.*

64. *See id.*

65. *See id.* at 242-43 (Vaidik, J., dissenting).

66. *See id.*

67. *Id.* at 243.

68. 720 N.E.2d 1171 (Ind. Ct. App. 1999).



When the jury has agreed upon a verdict, the verdict must be reduced to writing and signed by the foreman. When returned into court, the foreman shall deliver the verdict, and either party may poll the jury. If a juror dissents from the verdict, the jury shall be sent out to deliberate.<sup>69</sup>

In *Jelks*, after the jury's guilty verdict was read, the trial court polled the jury at Jelks' request. When asked if that was her verdict, a juror responded that it was not.<sup>70</sup> The trial court then asked the juror a series of questions regarding whether she believed the State had proven its case, her reasons for voting for guilty, and whether continued deliberations would be productive.<sup>71</sup> The trial court then sent the jurors back to the jury room to continue their deliberations. The jury later returned another guilty verdict.

On appeal Jelks contended that the trial court erred in engaging in a colloquy with the dissenting juror.<sup>72</sup> The court of appeals agreed and reversed his conviction, noting that

[t]he statute clearly provides that the remedy for juror dissent that arises during the polling procedure is to return the jury for deliberations, not engage in an extended colloquy about the elements of the crime, the State's burden, or the role of a juror. By doing so, the trial court tainted further deliberations and placed the defendant in a position of grave peril.<sup>73</sup>

In *Baxter v. State*,<sup>74</sup> the supreme court was asked to consider the propriety of allowing jurors who smoke to separate from those who do not smoke during deliberations. During the alleged "separation," three jurors were allowed to go outside, where they remained within the sight but not hearing of the court's bailiff, while the remaining jurors remained inside with the bailiff.

The supreme court reiterated the well-established and strict rule regarding jury separation during deliberations. "Barring exigent circumstances, in a criminal trial the jury is to remain together throughout deliberations and until a verdict is returned."<sup>75</sup> If the jury is allowed to separate, the State is ordinarily required to "prove beyond a reasonable doubt that the verdict was not affected by the separation and that the verdict is clearly supported by the evidence."<sup>76</sup> The court noted that it had never before addressed the propriety of allowing jurors who smoke to be in one room while nonsmokers are in another room and declined to address the issue in this case because it was not preserved by a timely

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69. IND. CODE § 34-36-1-9 (1998).

70. See *Jelks*, 720 N.E.2d at 1173-74.

71. See *id.* at 1173-74.

72. See *id.* at 1174.

73. *Id.*

74. 727 N.E.2d 429 (Ind. 2000).

75. *Id.* at 434.

76. *Id.*



objection.<sup>77</sup> Thus, the propriety of allowing smoking and nonsmoking jurors to be separated in any way during deliberations remains an open question in Indiana.

In light of *Baxter*, some trial judges may forbid any separation, thus requiring jurors who smoke to go for hours without a cigarette. This could potentially lead jurors who smoke to expedite their deliberations. On the other hand, trial courts could also require that all jurors go outside to stand near the few who happen to smoke. Depending on weather conditions, however, this could create some ill will among jurors.

The issue is perhaps best resolved by an agreement between the parties allowing a limited separation supervised by the bailiff during which the nonsmoking jurors would remain in the jury room under strict instructions not to discuss the case. Although existing law clearly forbids a separation, a defendant's explicit acquiescence to it would foreclose the possibility of raising the issue as error on appeal.

### C. Reasonable Doubt Instruction

Over four years ago, in *Winegeart v. State*,<sup>78</sup> a divided Indiana Supreme Court, acting under its "inherent and constitutional supervisory responsibilities,"<sup>79</sup> endorsed the Federal Judicial Center's reasonable doubt instruction for use by Indiana trial courts. That instruction provides:

The government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you [should] find [him/her] guilty. If on the other hand, you think there is a real possibility that [he/she] is not guilty, you [should] give [him/her] the benefit of the doubt and find [him/her] not guilty.<sup>80</sup>

Justice Dickson, joined by Justices Sullivan and Selby, made it clear that the

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77. See *id.* *Baxter* did not raise the issue until he filed a motion to correct error after trial. The court held that this was too late. See *id.* In a case in which the defendant does not learn of the separation until after trial, however, it would appear that the immediate filing of a motion raising the error would be sufficient to preserve the issue for appeal.

78. 665 N.E.2d 893 (Ind. 1996).

79. *Id.* at 902 (citing IND. CONST. art. VII, § 4).

80. *Id.* (brackets in original).



court was simply recommending, and not mandating, use of this instruction.

Justice DeBruler, joined by Chief Justice Shepard, wrote a concurring opinion in which he stated:

I do not share the majority's perception of deep problems within this area, nor the belief that the [Federal Judicial Center's jury instructions] are the appropriate remedy. Specifically, I do not believe that "firmly convinced" equates to "beyond a reasonable doubt." Both objectively and subjectively, "firmly convinced" seems more similar to "clear and convincing" than to "beyond a reasonable doubt." I find the [current] Indiana Pattern Jury Instruction . . . more than adequate.<sup>81</sup>

The issue was not revisited for two years. In *Young v. State*,<sup>82</sup> the defendant challenged the trial court's refusal of his tendered instruction and the giving of an instruction that instead used the second paragraph of the *Winegeart* instruction. The court rejected the challenge, noting that the "two instructions are substantively similar" and "trial courts are not required to give instructions already covered by other instructions."<sup>83</sup>

The court further explained that the words "imagination or speculation" and "absolute certainty" were approved in *Winegeart* and that "the instruction sufficiently establishe[d] the requisite degree of certainty—it requires the jury to be 'firmly convinced' of the defendant's guilt based on the evidence."<sup>84</sup>

In the two years since *Young*, several other defendants have brought challenges to the supreme court based on the *Winegeart* instruction. Most of these challenges have been dismissed in relatively short order. For example, in *Williams v. State*,<sup>85</sup> the court noted

Williams requested the trial court to give the instruction on the definition of reasonable doubt that now appears as Pattern Instruction 1.16. As the comments to that instruction observe, it was criticized in [*Winegeart*] and an alternative, which now appears as Instruction No. 1.15, was recommended by the majority of this Court. The trial court gave the reasonable doubt instruction that a majority of this Court recommended in *Winegeart*. It was not error to do so.<sup>86</sup>

Rather than attacking the entire instruction, other defendants have attempted to parse the instruction, arguing error based on certain sentences or phrases. These efforts have proved unsuccessful as well. For example, in *Ford v. State*,<sup>87</sup> the defendant challenged the use of the words "real possibility" asserting that "because the word 'real' is equated with 'very' in 'today's jargon,' the jury

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81. *Id.* at 904-05 (DeBruler, J., concurring in result) (internal citations omitted).

82. 696 N.E.2d 386 (Ind. 1998).

83. *Id.* at 390.

84. *Id.* (quoting *Winegeart*, 665 N.E.2d at 902).

85. 714 N.E.2d 644 (Ind. 1999), *cert. denied*, 528 U.S. 1170 (2000).

86. *Id.* at 650 (internal citation omitted).

87. 718 N.E.2d 1104 (Ind. 1999).



would have to find a 'significant or substantial doubt' before acquitting the defendant."<sup>88</sup> Justice Boehm, writing for a unanimous court and delivering a grammar lesson of sorts, noted:

"Real" in this context seems fairly clearly to be the adjective meaning "actual," not the slang adverb which is a corruption of "really" as in "real big deal." Whether or not every juror would identify this grammatical point, we do not believe anyone would conclude that the term "real possibility" would have the connotation Ford urges. The trial court did not err in giving this instruction.<sup>89</sup>

Other challenges have transcended grammar and focused on alleged violations of constitutional rights. In *Dobbins v. State*,<sup>90</sup> the defendant argued that the *Winegeart* instruction impermissibly "shifted the burden of proof" to him.<sup>91</sup> The supreme court rejected this argument, noting simply, "Defendant recognizes that we approved the trial court's reasonable doubt instruction in *Winegeart*. We decline to reconsider the issue here."<sup>92</sup>

The court's most exhaustive analysis appears in *Williams v. State*,<sup>93</sup> in which the defendant challenged the final sentence of the *Winegeart* instruction as being at odds with the presumption of innocence. Specifically, Williams argued that "the benefit of the doubt is extended to all defendants, not only those whom the jury feels there is a 'real possibility' are not guilty."<sup>94</sup> He also contended that the instruction "tells the jurors if they believe the defendant is actually guilty, they should not apply the presumption of innocence and the requirement of proof beyond a reasonable doubt in rendering a verdict."<sup>95</sup>

The court rejected these challenges on the basis that (1) the first sentence of the instruction made clear that the State had the burden of proving the defendant guilty beyond a reasonable doubt; (2) the presumption of innocence was explained by other instructions; and (3) "Williams points to no case from any jurisdiction that has found it to undermine the presumption of innocence or otherwise deprive a defendant of his or her liberty without due process of law in violation of the Fourteenth Amendment."<sup>96</sup> Nevertheless, in a footnote, the court explained that "two federal cases have cautioned against the use of the words 'real possibility' in a reasonable doubt instruction"<sup>97</sup> and that the Hawaii Court of Appeals "has also expressed disapproval of this language, and found an

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88. *Id.* at 1105.

89. *Id.*

90. 721 N.E.2d 867 (Ind. 1999).

91. *Id.* at 874.

92. *Id.* at 875.

93. 724 N.E.2d 1093 (Ind. 2000).

94. *Id.* at 1095.

95. *Id.*

96. *Id.* at 1096.

97. *Id.* at 1096 n.2 (citing *United States v. Porter*, 821 F.2d 968, 973 (4th Cir. 1987); *United States v. McBride*, 786 F.2d 45, 51-52 (2d Cir. 1986)).



instruction similar to the one in this case to be reversible error based on the 'firmly convinced' language."<sup>98</sup>

Since *Williams*, the supreme court has considered and rejected several other challenges to the *Winegeart* instruction.<sup>99</sup> The specific bases of these challenges are not always clear. In *Wright v. State*,<sup>100</sup> however, it was clear that the defendant was challenging the instruction under the state constitution.<sup>101</sup> Specifically, Wright asserted that the trial court's reasonable doubt instructions, including the *Winegeart* instruction, violated article I, section 19 of the Indiana Constitution.<sup>102</sup> Because Wright did not object to the instructions at trial, the supreme court purportedly considered only whether the instructions were fundamentally erroneous.<sup>103</sup> Nevertheless, the language of the opinion rather explicitly finds no state constitutional violation.

Instructions 15 and 21 do not violate Article I, section 19. The instructions inform the jurors that if they conclude beyond a reasonable doubt that the defendant is guilty, they should return a verdict of guilty. The instructions are hardly offensive to any of our fundamental precepts of criminal justice; indeed, we have approved of them in several previous cases.<sup>104</sup>

Thus, based on *Wright*, the state constitutional issue, at least under article I, section 19, is now settled and raising it in future cases will prove futile.

Thus, it would appear that the *Winegeart* instruction is here to stay, as challenges based on both the federal and state constitution have been raised and rejected. However, no defendant has yet asked the supreme court simply to revisit its recommendation in *Winegeart* and consider either to "unrecommend" the Federal Judicial Center pattern instruction or to recommend a better alternative. The potential success of such an argument would appear somewhat dubious in light of the court's consistent refusal to revisit the issue. Nevertheless, the composition of the current court is quite different from the court that decided *Winegeart*. Although Justices Dickson and Sullivan of the majority remain, so does Chief Justice Shepard, who opposed the recommendation from the beginning. Furthermore, Justices Boehm and Rucker

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98. *Id.* (citing *State v. Perez*, 976 P.2d 427, 441-42 (Haw. Ct. App. 1998), *cert. granted on other grounds* by 976 P.2d 379 (Haw. 1999)).

99. *See Maul v. State*, 731 N.E.2d 438, 441 (Ind. 2000); *Wright v. State*, 730 N.E.2d 713, 716 (Ind. 2000); *McGregor v. State*, 725 N.E.2d 840, 842 (Ind. 2000); *Warren v. State*, 725 N.E.2d 828, 832 (Ind. 2000); *Turnley v. State*, 725 N.E.2d 87, 89 (Ind. 2000).

100. 730 N.E.2d at 713.

101. *Id.* at 716. In an earlier case, *Childers v. State*, the court found that any claim under the state constitution was forfeited on appeal because it was not raised in the trial court. 719 N.E.2d 1227, 1232 (Ind. 1999).

102. *See Wright*, 730 N.E.2d at 716.

103. *See id.*

104. *Id.* (citing *Barber v. State*, 715 N.E.2d 848, 851 (Ind. 1999); *Winegeart v. State*, 665 N.E.2d 893, 895 (Ind. 1996)).



have joined the court since *Winegeart*.

Although the loudest grumblings about the *Winegeart* instruction come from the criminal defense bar, dissatisfaction also appears to be present among some trial judges who continue to give the pre-*Winegeart* pattern instruction. Moreover, the committee of the Indiana Judges Association responsible for the Pattern Instructions has proposed a new reasonable doubt instruction to replace the one recommended in *Winegeart*. The proposed instruction reads:

The burden is upon the State to prove beyond a reasonable doubt that the defendant is guilty of the crime(s) charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant's guilt. But it does not mean that a defendant's guilt must be proved beyond all possible doubt.

A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the defendant's guilt, after you have weighed and considered all the evidence.

A defendant must not be convicted on suspicion or speculation. It is not enough for the State to show that the defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The State does not have to overcome every possible doubt.

The State must prove each element of the crime(s) by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance.

If you find that there is a reasonable doubt that the defendant is guilty of the crime(s), you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration.<sup>105</sup>

Although this proposed instruction is somewhat lengthy, it does not suffer from some of the alleged defects noted above. It eliminates the "real possibility" language and adds considerable language explaining the gravity of the State's burden. However, the proposed pattern instruction maintains the "firmly convinced" language, which was the source of concern in the *Winegeart* concurrence written by Justice DeBruler.<sup>106</sup> Nevertheless, the instruction appears to be a palatable alternative to the *Winegeart* instruction. If ultimately adopted, it is likely that many defendants will tender this instruction and many trial judges will be inclined to move away from the *Winegeart* recommendation based on the new instruction's status as a pattern instruction.

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105. *Proposed Criminal Instruction Amendments*, RES GESTAE, June 2000, at 21.

106. *See Winegeart*, 665 N.E.2d at 904 (DeBruler, J., concurring in result).



#### *D. Material Variance*

In *Allen v. State*,<sup>107</sup> the supreme court addressed a claim of material variance in a manner that raises several questions that will likely resurface in future cases. "A variance is an essential difference between the pleading and the proof."<sup>108</sup> Not all variances are material or fatal.<sup>109</sup> In determining whether a variance is material, courts consider:

- (1) was the defendant misled by the variance in the evidence from the allegations and specifications in the charge in the preparation and maintenance of his defense, and was he harmed or prejudiced thereby;
- (2) will the defendant be protected in [a] future criminal proceeding covering the same event, facts, and evidence against double jeopardy?<sup>110</sup>

In *Allen*, the defendant was charged with several counts including criminal deviate conduct, which is defined by statute as "an act involving: (1) a sex organ of one person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object."<sup>111</sup> Count IV alleged that the act involved Allen's sex organ and the victim's anus.<sup>112</sup> The State's physician testified at trial that the "injury [was] an injury of forcible sexual assault caused by a forcible penetration into the anus [by] a blunt object."<sup>113</sup> There was also testimony that the injury was "sexual in nature" and that the profuse bleeding could have washed away any sperm.<sup>114</sup> Although sperm was found on the victim's shorts, none was found in her anus.<sup>115</sup> The State did not elicit any direct testimony that Allen's sex organ was the cause of the injury.<sup>116</sup>

On appeal Allen argued that a material variance existed because he was charged with criminal deviate conduct involving his sex organ while the evidence at trial indicated that the act was committed by a blunt object.<sup>117</sup> The State responded that the physician's testimony of penetration by a "blunt object" and the presence of sperm on the victim's shorts was evidence from which the jury could infer that the defendant committed the offense with his sex organ.<sup>118</sup>

The supreme court noted that the statute defines the offense alternatively as penetration by a "sex organ" or "object," and that the State charged the former.<sup>119</sup>

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107. 720 N.E.2d 707 (Ind. 1999).

108. *Mitchem v. State*, 685 N.E.2d 671, 677 (Ind. 1997).

109. *See id.*

110. *Id.*

111. IND. CODE § 35-41-1-9 (1998).

112. *Allen*, 720 N.E.2d. at 714.

113. *Id.* at 713.

114. *Id.*

115. *Id.*

116. *See id.*

117. *See id.* at 712.

118. *Id.* at 714.

119. *Id.*



Although the State could have elicited testimony that the penetration was by a sex organ, it did not. The court reversed the conviction and remanded that count for a new trial, noting that the conviction made a "fifty-year difference" in the defendant's sentence and thus "the State should provide evidence that plainly matches the charge."<sup>120</sup>

*Allen* was a 3-2 decision, written by Chief Justice Shepard who was joined by Justices Sullivan and Rucker. Justice Dickson dissented, noting that "the State did not assert anal penetration by any 'blunt object' other than the defendant's 'sex organ.' The defendant was not charged with one criminal act and confronted at trial with evidence of a different act. He was not misled."<sup>121</sup> Justice Boehm also dissented. He noted:

The jury was properly instructed on the elements of criminal deviate conduct and also instructed to rely on the common sense that it had gained from day-to-day living. It heard evidence that semen was found in the victim's shorts. In my view, this was sufficient to support the inference that a penis was the blunt object.<sup>122</sup>

The majority's opinion in *Allen* suggests a rather strict application of the material variance doctrine. It requires the State to prove its case by "evidence that plainly matches the charge."<sup>123</sup> This appears to be a higher standard than the well-established one of merely determining whether the defendant was misled by the variance in the preparation of his defense. Such a strict rule would likely lead to greater success by defendants raising the issue on appeal. However, the court appears to limit its holding to cases involving lengthy sentences. Thus, a defendant appealing a variance in a misdemeanor or D felony case may not achieve the same success as did the defendant in *Allen*, who was challenging an A felony count on which he received a fifty year sentence.

*Allen* also raises additional questions about waiver and remedy, both areas that will likely need to be addressed in future cases. A footnote in *Allen* states that the court addressed the issue "on the merits, as the State has not claimed that Allen waived it."<sup>124</sup> No further explanation is provided. Errors are waived, or forfeited, in a number of ways, and in the context of material variance there is authority requiring that the issue "be raised by an objection specifically pointed out to the trial court at the time it arises."<sup>125</sup> Thus, it would appear that Allen did not object when the State elicited testimony about penetration with a blunt object. Indeed, had Allen objected when the State's physician testified about penetration by a blunt object, the State surely would have asked the witness if the blunt object could have been Allen's sex organ, which would have resolved the issue and left nothing for Allen to appeal. Thus, if the appellate courts continue

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120. *Id.*

121. *Id.* at 716 (Dickson, J., concurring in part and dissenting in part).

122. *Id.* (Boehm, J., concurring in part and dissenting in part).

123. *Id.* at 714.

124. *Id.* at 713 n.4.

125. *Madison v. State*, 130 N.E.2d 35, 46 (Ind. 1955) (Arterburn, J., concurring).



not to apply waiver when waiver is not raised by the State on appeal, defendants have a powerful incentive not to object at trial.<sup>126</sup>

Finally, the supreme court in *Allen* “reverse[d] Allen’s conviction on Count IV and remand[ed] that count for a new trial.”<sup>127</sup> Allen did not petition for rehearing, and thus one might infer that he believed retrial, rather than acquittal, to be the proper remedy. Indeed, other supreme court cases that have found a material variance have similarly stated that the remedy is a new trial.<sup>128</sup> However, the court of appeals has routinely ordered discharge, acquittal, or reduction to a lesser offense upon a finding of material variance.<sup>129</sup> Interestingly enough, a number of these conflicting opinions are cited in *Allen* with the parenthetical “all reversing convictions on the basis of material variance” but no explanation is offered for the disparate treatment.<sup>130</sup>

In simple challenges to the sufficiency of the evidence to support a conviction, it is clear that a defendant cannot be retried, i.e., the State does not get a second chance to prove what it failed to prove the first time.<sup>131</sup> In material variance cases, however, the State has usually proved all the material elements of a crime, but it just happens to be a different crime than the one charged. Thus, the issue remains whether the State should get a second bite of the apple. The issue will likely be raised in a future case, and the court of appeals or supreme court, with the benefit of far more analysis than is available here, will be called upon to resolve the inconsistencies.

### *E. Double Enhancements*

In *Ross v. State*,<sup>132</sup> the supreme court granted transfer to address the propriety of double enhancements in a handgun case. In that case, the defendant was

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126. It is not uncommon for the supreme court to find issues waived, despite the failure of the State to assert waiver. See, e.g., *Dye v. State*, 717 N.E.2d 5, 13 & n.6 (Ind. 1999), cert. denied, 121 S. Ct. 379 (2000); *Kindred v. State*, 540 N.E.2d 1161, 1169 (Ind. 1989).

127. *Allen*, 720 N.E.2d at 714.

128. See, e.g., *Kirk v. State*, 235 N.E.2d 684 (Ind. 1968); *Ferrell v. State*, 219 N.E.2d 804 (Ind. 1966); *Tullis v. State*, 103 N.E.2d 353 (Ind. 1952);

129. See, e.g., *Miller v. State*, 616 N.E.2d 750, 757 (Ind. Ct. App. 1993) (remanding “to the trial court with instructions to sentence [the defendant] for the lesser included offense, Criminal Confinement as a class D felony”); *Waye v. State*, 390 N.E.2d 700, 702 (Ind. Ct. App. 1979) (finding that “there was a fatal variance between the information and the proof at trial and the trial court erred in overruling Waye’s motion for judgment on the evidence.”); *Wilson v. State*, 330 N.E.2d 356, 362 (Ind. Ct. App. 1975) (remanding “with directions that an acquittal be entered as to Count I and that appellant Wilson be discharged as to that count only”); *Hochman v. State*, 300 N.E.2d 373, 375 (Ind. Ct. App. 1973) (reversing judgment and ordering defendant discharged); but see *Bailey v. State*, 314 N.E.2d 755, 758 (Ind. Ct. App. 1974) (reversing and remanding case to the trial court).

130. *Allen*, 720 N.E.2d at 714 n.5.

131. See, e.g., *Vest v. State*, 621 N.E.2d 1094, 1096-97 (Ind. 1993).

132. 729 N.E.2d 113 (Ind. 2000).



convicted of carrying a handgun without a license, a class A misdemeanor. Based on a prior felony conviction, Ross's A misdemeanor conviction was enhanced to a Class C felony under the handgun statute. Then, Ross was adjudicated a habitual offender under the general habitual offender statute because he had two prior unrelated felony convictions.<sup>133</sup> Ultimately, Ross was sentenced to eighteen years, eight for the C felony enhanced by ten for the habitual offender adjudication, for what otherwise began as a misdemeanor with a maximum sentence of one year.<sup>134</sup>

Applying well-settled principles of statutory construction, the supreme court held that the trial court erred in enhancing the handgun offense a second time.<sup>135</sup>

In light of the statutory construction favoring more specific statutes as opposed to more general ones and because of the Rule of Lenity, a misdemeanor conviction under the handgun statute, once elevated to a felony due to a prior felony conviction, should not be enhanced again under the general habitual offender statute.<sup>136</sup>

Although the *Ross* court settled the issue of double enhancements in cases involving the enhancement of a handgun charge and the general habitual offender statute, the larger concern seems to be the potentially far-reaching effect of the case. At an October 2000 meeting of the Criminal Law Study Commission, the executive director of the Indiana Prosecuting Attorneys Council voiced concern that *Ross* may call into question a range of other criminal statutes that include an intermediate enhancement for second-time offenders.<sup>137</sup> There are more than thirty statutes with intermediate enhancements.<sup>138</sup> Application of *Ross* to these cases could result in a significant curtailment of current prosecutorial charging practice and a significant reduction in sentencing ranges.

Three months after *Ross*, the court of appeals in *Wood v. State*<sup>139</sup> addressed the propriety of further enhancing a C felony charge of operating a vehicle after lifetime suspension under the general habitual offender statute. The court relied in part on *Ross* but largely followed the supreme court's earlier precedent in *Stanek v. State*,<sup>140</sup> in which the court held that because the habitual traffic offender statute is a discrete, separate, and independent habitual offender statute, convictions under that statute are not subject to further enhancement under the general habitual offender statute.<sup>141</sup>

In response to *Ross*, prosecutors have vowed to work during the 2001 session

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133. *See id.* at 114.

134. *See* Rick Thackeray, *Prosecutors Troubled by Habitual Offender Ruling*, IND. LAW., Oct. 25, 2000, at 3. The supreme court's opinion does not provide the length of Ross's sentence.

135. *See Ross*, 729 N.E.2d at 117.

136. *Id.*

137. *See* Thackeray, *supra* note 134, at 3.

138. *See id.*

139. 734 N.E.2d 296 (Ind. Ct. App. 2000).

140. 603 N.E.2d 152 (Ind. 1992).

141. *See Wood*, 734 N.E.2d at 298 (citing *Stanek*, 603 N.E.2d at 153-54).



to insert language into the general habitual offender statute that will make it clear that a defendant whose conviction has been enhanced once is still eligible for habitual offender enhancement.<sup>142</sup> Such a change in the statute would appear to resolve the issue, as *Ross* is based on statutory construction and not a violation of the Indiana constitutional prohibition against disproportionate sentences<sup>143</sup>

### *F. Double Jeopardy Revisited*

As explained in last year's Survey,<sup>144</sup> in October 1999 the supreme court issued *Richardson v. State*,<sup>145</sup> in which it "formulated a new methodology for analysis of claims under the Indiana Double Jeopardy Clause."<sup>146</sup> The court in *Richardson* explained the "actual evidence test"<sup>147</sup> as follows:

Under this inquiry, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.<sup>148</sup>

In addition to the evidence presented at trial, the reviewing court may also look at the court's instructions to the jury and the closing arguments of counsel.<sup>149</sup>

Under the actual evidence test of *Richardson*, defendants now have a much easier path to relief than previously available under the federal Double Jeopardy Clause.<sup>150</sup> Thus, it should come as no surprise that during the first year after *Richardson*, convictions were vacated or reduced in many cases.<sup>151</sup>

142. See Thackeray, *supra* note 134, at 3.

143. See IND. CONST. art. I, § 16.

144. See Joel M. Schumm & James A. Garrard, *Recent Developments in Indiana Criminal Law and Procedure*, 33 IND. L. REV. 1197, 1226-28 (2000).

145. 717 N.E.2d 32 (Ind. 1999).

146. *Taylor v. State*, 717 N.E.2d 90, 95 (Ind. 1999).

147. The court in *Richardson* also adopted a statutory elements test. See Schumm & Garrard, *supra* note 144, at 1226. However, that test provides no additional protection beyond the Federal Constitution. See *id.* at 1227.

148. *Richardson*, 717 N.E.2d at 53.

149. See *id.* at 54 n.48; see also *Lowrimore v. State*, 728 N.E.2d 860, 868 (Ind. 2000).

150. See Schumm & Garrard, *supra* note 144, at 1232.

151. See, e.g., *Grace v. State*, 731 N.E.2d 442, 445-46 (Ind. 2000); *Logan v. State*, 729 N.E.2d 125, 136 (Ind. 2000); *Lowrimore*, 728 N.E.2d at 863; *Marcum v. State*, 725 N.E.2d 852, 864 (Ind. 2000); *Wise v. State*, 719 N.E.2d 1192, 1200-01 (Ind. 1999); *Hampton v. State*, 719 N.E.2d 803, 808 (Ind. 1999); *Noble v. State*, 734 N.E.2d 1119, 1125-26 (Ind. Ct. App. 2000); *Sanders v. State*, 734 N.E.2d 646, 651-52 (Ind. Ct. App. 2000); *Davies v. State*, 730 N.E.2d 726, 741 (Ind. Ct. App.



Likewise, it should come as no surprise that the Attorney General has been less than enthusiastic about *Richardson* and its progeny. One example of this is *Spears v. State*,<sup>152</sup> in which the State raised several "novel" responses to the defendant's claim that his dual convictions for murder and robbery as a Class A felony violated the Indiana Double Jeopardy Clause.<sup>153</sup> Two are worthy of mention here: one that was settled and another that is certain to resurface in future cases.

First, the court rejected the State's contention that the proper remedy for a double jeopardy violation was remand for retrial.<sup>154</sup> The court noted that the State cited no double jeopardy precedent in support, nor did the court find any. "To the contrary, both before and after *Richardson*, the remedy for double jeopardy violations has routinely been to reduce or vacate one of the convictions."<sup>155</sup> The court concluded that the State "was given one opportunity to try Spears on the charges it selected, the evidence it presented, and the closing argument it chose to make. It is not entitled to a second bite of the apple."<sup>156</sup>

The State also argued in *Spears* that the case "should be remanded to the trial court 'for the trial court's ruling on whether the two crimes are the same for double jeopardy purposes.'"<sup>157</sup> It contended that this "intensely factual determination" would best be made by the trial court, and then could be reviewed by the appellate court for an abuse of discretion.<sup>158</sup> The State asserted that the issue was similar to the existence of a "serious evidentiary dispute" in the context of instructions on lesser included offenses, an area in which the court defers to trial court's findings.<sup>159</sup>

The court noted that it had not "expressly ruled on the standard of review in double jeopardy cases," but acknowledged that the determination of the "reasonable possibility" component of *Richardson* "turns on an analysis of the evidence."<sup>160</sup> However, the trial court in *Spears*, which was tried before *Richardson* was issued, made no findings. "Even if we were to adopt a standard of review analogous to that applied to the instruction issue, de novo review is appropriate where the trial court made no finding."<sup>161</sup>

Thus, in light of *Spears*, it is likely that defense counsel (or, possibly even prosecutors) will begin to argue the double jeopardy issue to the trial court with the hope of securing a factual determination that will aid their case on appeal. Considering the frequency with which such claims arise, it is likely that the court

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2000); *Belser v. State*, 727 N.E.2d 457, 462 (Ind. Ct. App. 2000).

152. 735 N.E.2d 1161 (Ind. 2000).

153. *Id.* at 1165.

154. *See id.* at 1166.

155. *Id.*

156. *Id.*

157. *Id.* at 1165-66.

158. *Id.* at 1166.

159. *Id.* (citing *Brown v. State*, 703 N.E.2d 1010, 1019 (Ind. 1998)).

160. *Id.*

161. *Id.*



of appeals and supreme court will soon be called upon to decide whether deference is to be given to such findings.

### *G. Appellate Review of Sentences*

Claims of sentencing error are among the most frequently issued raised on appeal in criminal cases. As the Indiana Supreme Court has made increasingly clear in recent cases, there are two basic types of sentencing error: (1) procedural challenges to the sentencing statement as relying on improper aggravating circumstances or overlooking significant mitigating circumstances and (2) substantive challenges to the length of the sentence as manifestly unreasonable.<sup>162</sup> These are two separate inquiries reviewed under different standards.<sup>163</sup>

As to the first type of error, it is well settled that when a trial court relies on aggravating or mitigating circumstances to deviate from the presumptive sentence, it must “(1) identify all of the significant mitigating and aggravating circumstances, (2) state the specific reason why each circumstance is considered to be mitigating or aggravating, and (3) articulate the court’s evaluation and balancing of the circumstances to determine if the mitigating circumstances offset the aggravating ones.”<sup>164</sup> If the trial court merely imposes the presumptive sentence, it need not delineate the aggravating and mitigating circumstances and weigh them.<sup>165</sup>

Successful claims of procedural sentencing error generally result in remand for a new sentencing statement. For example, in *Dowdell v. State*,<sup>166</sup> the trial court failed to find the defendant’s lack of criminal history as a mitigating circumstance. The court reiterated that an “allegation that the trial court failed to find a mitigating circumstance requires [the defendant] to establish that the mitigating evidence is both significant and clearly supported by the record.”<sup>167</sup> The court noted the significance of this mitigating circumstance and the State’s concession of error in holding that remand for “resentencing on this record” was required.<sup>168</sup>

Claims of improper aggravating circumstances, however, do not always result in remand. The court has sometimes declined to consider claims of improper aggravators, noting that it “need not address these contentions because a single aggravating circumstance may be sufficient to support an enhanced sentence. If the trial court improperly applies an aggravator, but other valid

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162. See *Noojin v. State*, 730 N.E.2d 672, 678 (Ind. 2000) (citing *Hackett v. State*, 716 N.E.2d 1273, 1276 n.1 (Ind. 1999)).

163. See *id.*

164. *Carter v. State*, 711 N.E.2d 835, 838 (Ind. 1999) (citing *Hammons v. State*, 493 N.E.2d 1250, 1254 (Ind. 1986)).

165. See *Jackson v. State*, 728 N.E.2d 147, 154 (Ind. 2000).

166. 720 N.E.2d 1146 (Ind. 1999).

167. *Id.* at 1154.

168. *Id.* at 1155.



aggravators exist, a sentence enhancement may still be upheld.”<sup>169</sup> However, in some cases in which the trial court relied on one or more improper aggravating circumstances, the court has remanded for a new sentencing hearing because it was unable to conclude that the trial court would have imposed the same sentence had it not relied on the improper aggravating circumstances.<sup>170</sup> Finally, the supreme court has, in some recent cases, simply ordered a reduction of the sentence to the presumptive when the trial court erred in its sentencing statement.<sup>171</sup> Nevertheless, remand appears to remain the usual remedy.<sup>172</sup>

Unlike claims of procedural sentencing error, substantive challenges to the length of sentence imposed have proven to be more difficult both for advocates to advance and for appellate courts to address. In many states, even today the length of a statutorily authorized sentence is unassailable on appeal.<sup>173</sup> This was also true in Indiana before 1970 when the Indiana Constitution was amended to give both the supreme court<sup>174</sup> and court of appeals<sup>175</sup> the power to review and revise sentences.<sup>176</sup> According to the Report of the Judicial Study Commission,

169. *Wiley v. State*, 712 N.E.2d 434, 446 (Ind. 1999) (internal citations omitted); *see also* *Gibson v. State*, 702 N.E.2d 707, 710 (Ind. 1998).

170. *See* *Wooley v. State*, 716 N.E.2d 919, 933 (Ind. 1999); *see also* *Angleton v. State*, 686 N.E.2d 803, 817 (Ind. 1997).

171. *See* *Meagher v. State*, 726 N.E.2d 260, 267 (Ind. 2000) (“Because the trial court found no significant aggravating or mitigating circumstances, we conclude that the imposition of presumptive sentences for each guilty offense is appropriate.”); *Marcum v. State*, 725 N.E.2d 852, 864 (Ind. 2000) (“Here, however, because the trial court found the aggravating and mitigating circumstances to be in balance, there is no basis on which to impose consecutive terms. Accordingly, this case is remanded to the trial court with direction to impose concurrent sentences on all counts.”).

172. *See, e.g.*, *Stone v. State*, 727 N.E.2d 33, 38 (Ind. Ct. App. 2000).

173. *See, e.g.*, *Sinkfield v. State*, 669 So. 2d 1026, 1028 (Ala. Crim. App. 1995) (“This court will not disturb a sentence on appeal where the trial court imposes a sentence within the statutory range.”); *Abbott v. State*, 508 S.W.2d 733, 735-36 (Ark. 1974) (“[R]eview of sentences which are not in excess of statutory limits is not within the jurisdiction of this court because the exercise of clemency is a function of the executive branch of the government under Art. 6, Sec. 18 of the Arkansas Constitution, and this court is not at liberty to reduce a sentence within statutory limits, even though we might think it unduly harsh.”); *Quillen v. State*, 929 P.2d 893, 902 (Nev. 1996) (“[A] sentence will be upheld if it is within the district judge’s authority to assess.”); *Sampayo v. State*, 625 S.W.2d 33, 35 (Tex. Crim. App. 1981) (“The law is well-settled in Texas that a sentence will not be disturbed if the penalty is within the prescribed limits set by the legislature.”).

174. IND. CONST. art. VII, § 4.

175. IND. CONST. art. VII, § 6.

176. Indiana’s constitutional amendment came at a time when the issue was receiving national attention. For example, in 1968 the American Bar Association observed of sentencing in the United States that “in no other area of our law does one man exercise such unrestricted power. No other country in the free world permits the condition to exist.” AMERICAN BAR ASS’N, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 1-2 (1968). In light of the availability of the appellate process to civil litigants, the



"[t]he proposal that the appellate power in criminal cases include the power to review sentences is based upon the efficacious use to which that power has been put by the Court of Criminal Appeals in England."<sup>177</sup>

Although neither the court of appeals nor the supreme court reduced a sentence for over a decade,<sup>178</sup> the supreme court, and to a lesser extent the court of appeals, have been far more receptive to reducing sentences in recent years. The authority to reduce a sentence, although grounded in the Indiana Constitution, is prescribed in greater detail by Rule 7(B) (formerly Rule 17(B)) of the Indiana Rules of Appellate Procedure, which provides the courts may not revise statutorily authorized sentences unless they are "manifestly unreasonable in light of the nature of the offense and the character of the offender."<sup>179</sup> Many cases have noted that the court's review under this rule<sup>180</sup> is "very deferential" to the trial court: "The issue is not whether in our judgment the sentence is unreasonable, but whether it is clearly, plainly, and obviously so."<sup>181</sup>

During the survey period, the supreme court reduced sentences in four cases on direct appeal:<sup>182</sup> (1) a fourteen-year-old defendant who committed several crimes, including the rape and murder of a sixty-nine year-old woman (from 199 to ninety-seven years);<sup>183</sup> (2) a sixteen-year-old defendant convicted of murder and conspiracy to commit murder (from ninety-five to sixty-five years);<sup>184</sup> (3) a sixteen-year-old defendant without a significant criminal history convicted of murdering and attempting to rob a ninety-year-old man (from 115 to sixty-five years);<sup>185</sup> and (4) a defendant with an "uncertain criminal history" who was convicted of murder for his participation as the driver of a car from which a passenger shot and killed a woman who had shouted a racial epithet (from sixty-five to fifty-five years).<sup>186</sup> In the first three of these cases, the court's opinions

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irony was striking: "Consider that a civil judgment of \$2,000 is reviewable in every state at least once, possibly on two appellate levels. Then consider the unreviewability of a sentence of twenty years in prison and a fine of \$10,000." JACK M. KRESS, *PRESCRIPTION FOR JUSTICE: THE THEORY AND PRACTICE OF SENTENCING GUIDELINES* 43 (1980) (citing M.E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 76-77 (1972)).

177. Report of the Judicial Study Commission at 5.

178. The court of appeals first reduced a sentence in *Cunningham v. State*, 469 N.E.2d 1, 9 (Ind. Ct. App. 1984), and the supreme court did so two years later in *Fointno v. State*, 487 N.E.2d 140, 149 (Ind. 1986).

179. *Spears v. State*, 735 N.E.2d 1161, 1168 (Ind. 2000).

180. Before the amendments that took effect January 1, 2001, the Rule appeared as Appellate Rule 17(B).

181. *E.g.*, *Spears*, 735 N.E.2d at 1168 (quoting *Bunch v. State*, 697 N.E.2d 1255, 1258 (Ind. 1998)).

182. The supreme court also granted transfer and reduced the sentence in *Evans v. State*, 725 N.E.2d 850 (Ind. 2000), as explained *infra* notes 203-04.

183. *See Trowbridge v. State*, 717 N.E.2d 138 (Ind. 1999).

184. *See Brown v. State*, 720 N.E.2d 1157 (Ind. 1999).

185. *See Cherrone v. State*, 726 N.E.2d 251 (Ind. 2000).

186. *See Baxter v. State*, 727 N.E.2d 429, 436 (Ind. 2000).



are based in large part on the "character of the offender," namely the defendant's youth and, to a lesser degree, lack of a significant criminal history. In the fourth case, the court seemingly relies on both the defendant's character and the nature of the crime in which he was not the key perpetrator. Reducing sentences in cases involving youthful defendants or defendants with no or minimal criminal histories is nothing new.<sup>187</sup> In addition, consideration of the nature of the crime has also been relied upon in the past as a reason to reduce a sentence. All of this is consistent with the language of Appellate Rule 7(B), which specifically mentions the "nature of the offense" and "character of the offender."

Unlike the supreme court, the court of appeals has historically been less inclined to reduce sentences. Two recent cases highlight the divergence of views in that court regarding its role under article VII, section 6. In *Bluck v. State*,<sup>188</sup> Judge Najam, joined by Judge Kirsch, noted that they had "struggled with the issue" of the proper role of an appellate court in reviewing a sentence and suggested (but declined to address because the case had to be remanded for resentencing due to procedural sentencing errors) that the sentence imposed was manifestly unreasonable.<sup>189</sup> Judge Garrard dissented, observing that although the supreme court "as the final arbiter of state law sentencing questions" has the authority to reduce sentences, two of three judges on a given panel of the fifteen-member court of appeals "should not exercise that authority absent the adoption of objective criteria governing the result."<sup>190</sup>

Two months later in *Allen v. State*,<sup>191</sup> Judge Garrard's view was quoted in a majority opinion authored by Senior Judge Hoffman and joined by Judge Garrard. The majority held that the statutory maximum sentence of nineteen years for reckless homicide, failure of driver to fulfill duties following an accident, and criminal recklessness was not "clearly, plainly, and obviously" unreasonable.<sup>192</sup> Judge Bailey dissented, observing "[w]hile it may be comfortable to rubber stamp every sentence supported by the ['objective criteria' of one remaining valid aggravating circumstances, such a dispassionate, complacent approach constitutes an abdication of the solemn constitutional responsibility imposed upon this court under Indiana's criminal justice system."<sup>193</sup>

There is only one published court of appeals opinion from the survey period in which a sentence was reduced as being manifestly unreasonable. In *Redmon v. State*,<sup>194</sup> the court reduced the maximum sentence of twenty years for burglary

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187. See, e.g., *Carter v. State*, 711 N.E.2d 835 (Ind. 1999) (reducing sentence of fourteen-year-old defendant); *Willoughby v. State*, 660 N.E.2d 570 (Ind. 1996) (reducing sentence for defendant who lacked a criminal history).

188. 716 N.E.2d 507 (Ind. Ct. App. 1999).

189. *Id.* at 515.

190. *Id.* at 517 (Garrard, J., dissenting).

191. 719 N.E.2d 815, 820 (Ind. Ct. App. 1999).

192. *Id.*

193. *Id.* at 820-21 (Bailey, J., dissenting).

194. 734 N.E.2d 1088 (Ind. Ct. App. 2000).



imposed on a fifteen-year-old who broke into the home of his mother and stepfather to the presumptive term of ten years.<sup>195</sup> The court noted that the burglary did not cause personal injury to anyone, caused little, if any, damage to the dwelling, and did not result in any appreciable cost to the victims.<sup>196</sup> Moreover, in looking at the character of the offender, the court noted that Redmon was only fifteen at the time of the offense and Indiana Supreme Court precedent holding that "[a] defendant's young age is to be given considerable weight as a mitigating circumstance,"<sup>197</sup> especially when the offender is younger than sixteen.<sup>198</sup>

Considering the rather dramatic change in membership of the court of appeals in the past few years, one might suspect that court to become more receptive to exercising its power under article VII, section 6 in the future. Judge Hoffman and Judge Garrard, both of whom served on the court for decades, are now senior judges who participate in relatively few cases. Judge Mathias, who had been on the court for less than six months, authored *Redmon*, and Judge Bailey, who had been on the court for only two years, wrote the strongly worded *Allen* dissent.

The receptiveness of the court of appeals to entertain claims of manifestly unreasonable sentences assumes new significance beginning in 2001. In November 2000, voters approved a constitutional amendment that will greatly reduce the mandatory jurisdiction of the supreme court. Before the amendment, the supreme court heard all criminal appeals in which the sentence imposed was greater than fifty years on any single count. After the amendment, all term-of-years appeals will now go to the court of appeals, and the supreme court will hear, on direct appeal, only death penalty and life without parole cases. Thus, if substantive sentence review is to take place in the future, it will have to be, at least in the first instance, in the court of appeals. With its dramatically reduced mandatory caseload, however, the supreme court now will have considerably more time to grant transfer in sentencing cases.

Regardless of whether the case is being heard in the court of appeals or the supreme court, substantive appellate review of sentences will likely continue to be a difficult issue. To some extent, this is unavoidable because sentencing decisions, which feature unique crimes and unique criminals, often, if not always, defy quantification.<sup>199</sup> Nevertheless, it is important that opinions strive for some degree of consistency to guide trial judges and advocates at both the trial and appellate levels, as well as to ensure that those defendants with similar backgrounds who commit similar offenses are treated similarly. As the cases discussed above highlight, both the supreme court and court of appeals have been especially receptive to reductions in cases of youthful defendants.<sup>200</sup> In addition,

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195. *See id.* at 1095.

196. *See id.* at 1094.

197. *Id.* (quoting *Brown v. State*, 720 N.E.2d 1157, 1159 (Ind. 1999)).

198. *See id.* (citing *Carter v. State*, 711 N.E.2d 835, 842 (Ind. 1999)).

199. *See generally Carter*, 711 N.E.2d at 841.

200. Other cases have made it clear that youth generally ceases to be a mitigating circumstance at age eighteen. *See, e.g., Sensback v. State*, 720 N.E.2d 1160 (Ind. 1999).



there is already considerable case law explaining when a defendant's mental illness should lead to a reduction of a sentence.<sup>201</sup> Along the same lines, one would hope that case law will continue to develop, drawing upon previous cases, in explaining when a reduction is appropriate and when it is not. Indeed, Indiana could look to other states that have developed an extensive body of sentencing law for guidance.<sup>202</sup>

Questions will continue to surface, however. For example, what amount of deference, if any, should the supreme court give to the court of appeals' review of a sentence? The two courts review sentences under similarly worded, yet separate, provisions of the Indiana Constitution. If the court of appeals affirms a sentence under article VII, section 6, the defendant may nonetheless ask the supreme court to review the sentence under article VII, section 4. Thus, defendants have two opportunities for sentence review, and both courts have the opportunity to improve upon the recent efforts to make the process of appellate sentence review more consistent and predictable.

The best predictor of this may be the supreme court's recent opinion in *Evans v. State*,<sup>203</sup> in which the defendant, who was sentenced to the maximum term of fifty years for dealing in cocaine, sought transfer after the court of appeals affirmed his sentence. The supreme court granted transfer and reduced the sentence to the presumptive term of thirty years, relying on the defendant's youthful age, lack of a violent criminal history, and the fact that the defendant had sold a relatively small amount of drugs to a police informant who sought him out.<sup>204</sup> There was no mention of deference to the court of appeals' holding that the sentence was not manifestly unreasonable, and thus it would appear that defendants have two chances to have their sentence reviewed by each court applying the same standard.

Another issue that may surface is whether the highly deferential "manifestly unreasonable" standard is consistent with the original purpose of the 1970 amendment, which purported to be modeled after the efficacious use to which that power has been put by the Court of Criminal Appeals in England. Clearly, appellate sentence review in Indiana is far less extensive than in England, but this is at least partially explained by the very different sentencing structures in each.

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201. See, e.g., *Weeks v. State*, 697 N.E.2d 28, 31 (Ind. 1998); *Archer v. State*, 689 N.E.2d 678, 685-86 (Ind. 1997); *Gambill v. State*, 675 N.E.2d 668, 677-78 (Ind. 1996); *Mayberry v. State*, 670 N.E.2d 1262, 1271 (Ind. 1996); *Barany v. State*, 658 N.E.2d 60, 67 (Ind. 1995); *Walton v. State*, 650 N.E.2d 1134, 1137 (Ind. 1995); *Christopher v. State*, 511 N.E.2d 1019, 1023 (Ind. 1987).

202. See, e.g., *Susanne Di Pietro, The Development of Appellate Sentence Review in Alaska*, JUDICATURE, Oct.-Nov. 1991, at 152-53 (noting that the Alaska Court of Appeals "routinely reduces excessive sentences to bring them in line with sentences given in comparable cases and has created an extensive body of case law articulating appropriate sentencing principles, establishing benchmark terms for many classes of offenses, . . . establishing standards for the extent to which sentences can be increased in aggravated cases . . . [and] regulating the total aggregate terms that may be imposed for offenders who are sentenced consecutively").

203. 725 N.E.2d 850 (Ind. 2000).

204. See *id.* at 851-52.



England has no criminal code and trial courts are free to choose any sentence (imprisonment, probation, commitment to a mental hospital, custodial training for young offenders, etc.) for any crime except murder, which is punishable only by an indefinite sentence of life imprisonment, and three rare offenses punishable by death.<sup>205</sup> If the trial court chooses imprisonment, it has a great deal of discretion as there are no mandatory minimum sentences (except for murder) and the maximum fixed by statute is “for the most part so much higher than what is normally considered appropriate for those offences that the process of fixing the length of imprisonment seldom involves any consideration of the statutory provision.”<sup>206</sup>

The Court of Appeal (Criminal Division) has jurisdiction to review sentences upon application by the defendant. According to statute, the appellate court may intervene “if it considers that the appellant should be sentenced differently for any offence for which he was dealt with by the court below” and may substitute for that sentence “such sentence . . . as it thinks appropriate for the case.”<sup>207</sup> Not surprisingly, appellate review of sentences is “the main business” of the Court of Appeal.<sup>208</sup>

Although the Court of Appeal has developed many sentencing principles that are worthy of consideration by Indiana’s appellate courts,<sup>209</sup> the wholesale, seemingly de novo review of sentences performed there has not, to date, been advocated here.<sup>210</sup> Such an activist role of the judiciary would appear to be unnecessary in light of the active role of the legislature in sentencing matters. Indeed, the ABA Standards for Sentencing advocate that reviewing courts “make effective the legislature’s public policy choices regarding sentencing.”<sup>211</sup> The current statutory scheme in Indiana requires that judges must adhere to somewhat narrow sentencing ranges for each class of offense<sup>212</sup> and prohibits suspension

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205. See D.A. Thomas, *Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience*, 20 ALA. L. REV. 193, 194 (1968).

206. *Id.* at 195; see also D.A. Thomas, *Sentencing in England*, 42 MD. L. REV. 90, 113 (“With the exception of a few offences for which the maximum sentence is set at a level which is lower than many judges would wish, the majority of sentences imposed are far below the permitted maximum sentence.”).

207. Thomas, *supra* note 206, at 196 (quoting Justice Act 1967, ch. 80, 97(7) (Eng.)).

208. *Id.*

209. See *id.* at 202-16.

210. See generally *Hardebeck v. State*, 656 N.E.2d 486, 489-90 (Ind. Ct. App. 1995).

211. AMERICAN BAR ASS’N, CRIMINAL JUSTICE SENTENCING STANDARDS, 18-8.2 (3d ed. 1994).

212. See IND. CODE §§ 35-50-2-3 (1998) (presumptive sentence for murder is 55 years; range is 45 to 65 years), 35-50-2-4 (presumptive sentence for a Class A felony is 30 years; range is 20 to 50 years), 35-50-2-5 (presumptive sentence for a Class B felony is 10 years; range is six to 20 years), 35-50-2-6 (presumptive sentence for a Class C felony is four years; range is two to eight years), 35-50-2-7 (presumptive sentence for a Class D felony is one and a half years; range is six months to three years).



of a sentence below the minimum for certain offenses<sup>213</sup> or certain offenders.<sup>214</sup> Statutory law provides a non-exhaustive list of circumstances to consider in imposing sentence.<sup>215</sup> Trial courts must impose consecutive sentences in certain circumstances,<sup>216</sup> have the discretion to do so in other circumstances,<sup>217</sup> but must adhere to specific limitations on the aggregate number of years.<sup>218</sup>

Nevertheless, one could question whether the highly deferential "manifestly unreasonable" standard currently applied is that which was envisioned at the time of the adoption of the 1970 amendment. Ultimately, this is an issue that can only be addressed by the supreme court if it decides to amend the appellate rules.

### CONCLUSION

In short, the legislation and decisional law of the Survey period provided a few answers but also left several questions unresolved. The General Assembly (with some help from the supreme court) corrected a technical, yet far-reaching, problem with the drunk driving statute and clarified a relatively obscure venue provision. In addition, the supreme court appears to have resolved long-standing confusion and inconsistency regarding the proper standard of review in challenges to confessions.

Nevertheless, important questions remain. Discontent over the seemingly unpopular yet constitutionally supportable *Winegeart* reasonable doubt instruction may lead to a call for reconsideration of the supreme court's 1996 "recommendation" in light of the numerous challenges and the soon-to-be adopted alternative pattern instruction. Questions will also continue to loom regarding what constitutes a material variance, whether that determination is influenced by the severity of the charge at issue, and whether remand for retrial or vacation of the conviction is the appropriate remedy. In the double jeopardy context, the court of appeals or supreme court will likely be asked to decide whether or not to defer to a trial court's determination of whether two offenses violate the Indiana Double Jeopardy Clause under *Richardson*'s actual evidence test.

Finally, beginning in 2001, the future of substantive appellate sentence review becomes even less certain as the supreme court, which has been fairly proactive in reducing sentences, loses its mandatory caseload of all term-of-years criminal appeals. These cases will now be heard by the court of appeals, which has historically been less receptive to sentence reductions but has recently shown signs of changing course. Regardless of whether substantive sentence review

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213. See *id.* § 35-50-2-2.

214. See *id.* §§ 35-50-2-2(b)(1)-(3), 35-50-2-2.1.

215. See *id.* § 35-38-7.1.

216. See *id.* § 35-50-1-2(d)-(e).

217. See *id.* § 35-50-1-2(c).

218. See *id.* ("[E]xcept for crimes of violence, the total consecutive terms of imprisonment . . . shall not exceed the presumptive sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.").



occurs in the court of appeals on direct appeal or is shaped through the grant of transfer by the supreme court, either court is well-positioned to develop sentencing principles that will not only aid litigants and trial judges in future sentencing cases but also ensure greater fairness and consistency, i.e., that similar defendants who commit similar crimes are treated similarly.







# SURVEY OF EMPLOYMENT LAW DEVELOPMENTS FOR INDIANA PRACTITIONERS

SUSAN W. KLINE\*

## INTRODUCTION

Although no seismic shifts occurred in Indiana employment law during the survey period, there were a number of noteworthy developments. Observers generally agree that the Seventh Circuit continues to be more pro-employer than most other Circuits. However, two of the female justices of the Seventh Circuit called for more plaintiff-friendly interpretations of the proof required to justify punitive damages,<sup>1</sup> to establish that an employer perceived the plaintiff as disabled,<sup>2</sup> and to support an affirmative defense in cases of sexual harassment by a supervisor.<sup>3</sup> In *DeClue v. Central Illinois Light Co.*,<sup>4</sup> Judge Ilana Diamond Rovner respectfully but spiritedly took issue with the majority holding that an employer's failure to provide a female lineman with civilized bathroom facilities was not actionable as hostile environment harassment.<sup>5</sup> Judge Rovner's most indignant statement came in *Equal Employment Opportunity Commission v. Indiana Bell Telephone Co.*,<sup>6</sup> where she rejected a defense to punitive damages based on the employer's collective bargaining agreement and concluded her detailed dissent by writing:

In the series of [the employer's] ineffective responses to [the supervisor's] harassment, one has no difficulty detecting a reckless

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1. See *Gile v. United Airlines, Inc.*, 213 F.3d 365, 376 (7th Cir. 2000) (Wood, J., dissenting in part and concurring in part).

2. See *Wright v. Ill. Dep't of Corr.*, 204 F.3d 727, 733-36 (7th Cir. 2000) (Rovner, J., dissenting).

3. See *Hill v. Am. Gen. Fin., Inc.*, 218 F.3d 639, 645-47 (7th Cir. 2000) (Wood, J., dissenting in part).

4. 223 F.3d 434 (7th Cir. 2000).

5. See *id.* at 437-40 (Rovner, J., dissenting in part). Judge Rovner wrote:

As my colleagues acknowledge, when an employer provides no restrooms at all to its employees and expects them to relieve themselves outdoors, the burden falls more heavily on women than it does on men. . . . If men are less reluctant to urinate outdoors, it is in significant part because they need only unzip and take aim . . . .

. . . [W]hen, in the face of complaints, an employer fails to correct a work condition that it knows or should know has a disparate impact on its female employees—that reasonable women would find intolerable—it is arguably fostering a work environment that is hostile to women, just as surely as it does when it fails to put a stop to the more familiar types of sexual harassment.

*Id.* at 438 (citations omitted).

6. 214 F.3d 813 (7th Cir. 2000).



indifference to the plight of the company's female workers. . . . The fact that it took the company nearly twenty years to bring the harassment to an end is telling in and of itself.

Twenty years!

I respectfully dissent.<sup>7</sup>

Judge Rovner may not be alone in her views because the Seventh Circuit subsequently granted rehearing *en banc* in the case.<sup>8</sup> Circuit-watchers should be alert for signs that these dissenting voices are gaining ground and shifting the Seventh Circuit toward greater receptivity to plaintiffs' arguments.

This Article begins with a broad overview of national trends and highlights which types of plaintiff claims are most prevalent and which are increasing. The Article then offers a brief review of the major national developments and moves on to a statute-by-statute review of significant Seventh Circuit and Indiana employment cases. A brief discussion of the latest decisions concerning the states' Eleventh Amendment immunity from certain federal employment laws follows. After a review of the most noteworthy procedural developments during the survey period, the Article concludes by suggesting several substantive issues that are percolating and bear further monitoring.

#### I. TRENDS IN CHARGE FILINGS AND RESOLUTIONS—A NATIONAL PERSPECTIVE

Recent national Equal Employment Opportunity Commission (EEOC) charge statistics offer a broad perspective on employment law trends.<sup>9</sup> Surprisingly, EEOC charge activity declined in fiscal year 1999 to 77,444 charges received, but rebounded in fiscal year 2000 to 79,896 charges, which is the highest volume since 1997.<sup>10</sup> The overall rate of "reasonable cause" findings remains relatively low, but in 2000, the percent of such findings increased to a record high of nearly nine percent, compared to an annual average of less than four percent over the prior eight years.<sup>11</sup>

Streamlined procedures, coupled with a decline in charges filed, have enabled the EEOC to process claims more promptly. For example, in 1995, it took up to eighteen months merely for the EEOC to assign an investigator to a

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7. *Id.* at 836 (Rovner, J., concurring in part and dissenting in part).

8. *See* EEOC v. Ind. Bell Tel. Co., No. 99-1155, 2000 U.S. App. LEXIS 22797, at \*1 (7th Cir. Sept. 6, 2000).

9. Title VII, ADA and ADEA plaintiffs must normally file timely EEOC charges prior to commencing suit. *See* Douglas L. Williams & Melinda Rothhaar McAfee, *Handling the EEOC Investigation*, in 2 ALI-ABA COURSE OF STUDY MATERIALS—EMPLOYMENT AND LABOR LAW (8th ed. 1997) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974)).

10. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ALL STATUTES: FY 1992-FY 2000 (last modified Jan. 18, 2001), at <http://www.eeoc.gov/stats/all.html>.

11. *See id.*



case.<sup>12</sup> In the EEOC's Indianapolis district office, which serves Indiana and Kentucky, claim processing time has improved to a six-month turnaround. Two operational changes have contributed to the improvement.<sup>13</sup> The first is a triage approach, whereby the agency conducts an early evaluation in an effort to quickly dismiss unfounded complaints and to expedite particularly strong charges.<sup>14</sup> The second is a voluntary mediation program established in 1999.<sup>15</sup> During the mediation program's first six months, eighty-three percent of employees agreed to mediation, compared to thirty-five percent of employers.<sup>16</sup> To encourage greater employer participation, the EEOC is publicizing two important facts: (1) over half of its mediation settlements result in no monetary award to the charging party, and (2) on average, mediations are resolved in fewer than ninety days.<sup>17</sup>

Although charge activity is down overall, some charges are becoming more frequent. Harassment charges, which were virtually nonexistent through 1985, accounted for over ten percent of the EEOC's charge activity by fiscal year 1990.<sup>18</sup> In 1999, that figure topped eighteen percent.<sup>19</sup>

Another notable growth trend is the increase in the number of retaliation charges filed under various statutes. In fiscal year 2000, twenty-seven percent of all charges filed included a claim of retaliation, compared to fifteen percent in 1992.<sup>20</sup>

The potential power of a retaliation claim is demonstrated in *Pryor v. Seyfarth, Shaw, Fairweather & Geraldson*.<sup>21</sup> Pryor, the plaintiff, cited five incidents of alleged harassment. However, Judge Richard Posner, writing for a unanimous panel, dismissed two incidents as "entirely innocuous," two as "mildly flirtatious," and found only one "possibly suggestive or even offensive."<sup>22</sup> Therefore, the alleged conduct was not so severe that a rational trier of fact could conclude that it changed Pryor's workplace conditions.<sup>23</sup>

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12. See Gregory Weaver, *An Agency's Recovery Act: With More Money and Manpower, EEOC Now Handles Discrimination Cases More Quickly*, INDIANAPOLIS STAR, May 29, 2000, at G1.

13. See *id.*

14. See *id.*

15. See *id.*

16. See *id.*

17. See *id.*

18. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, TRENDS IN HARASSMENT CHARGES FILED WITH THE EEOC DURING THE 1980S AND 1990S (last modified July 11, 2000), at <http://www.eeoc.gov/stats/harassment.html>.

19. See *id.*

20. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, CHARGE STATISTICS: FY 1992 THROUGH FY 2000 (last modified Jan. 18, 2001), at <http://www.eeoc.gov/stats/charges.html> [hereinafter CHARGE STATISTICS].

21. 212 F.3d 976 (7th Cir. 2000).

22. *Id.* at 977-78.

23. See *id.* at 978.



However, three months after Pryor filed her sexual harassment claim, her law firm employer fired her for gluing an artificial fingernail onto a friend's finger in the ladies' room.<sup>24</sup> The Seventh Circuit reversed summary judgment for the firm on the issue of retaliation based on Pryor's nine-year record of satisfactory written performance reviews, the firm's failure to follow its progressive discipline policy, and the fact that the thirty-second process was not prohibited by any work rule and occurred while Pryor was on break.<sup>25</sup> Given these circumstances, Judge Posner concluded Pryor had a triable retaliation claim, albeit no triable discrimination claim, because a reasonable jury could find that the firm used pretextual evidence of misconduct as a "figleaf" to cover up retaliation for the sexual harassment charge.<sup>26</sup>

## II. NATIONAL EMPLOYMENT DISCRIMINATION DEVELOPMENTS

The leading U.S. Supreme Court employment law case during the survey period was *Reeves v. Sanderson Plumbing Products, Inc.*,<sup>27</sup> an age discrimination case. The Court granted certiorari in *Reeves* to resolve a circuit split over whether a plaintiff's prima facie case for discrimination, coupled with sufficient evidence for a trier of fact to reject a nondiscriminatory explanation for the employer's adverse action, is adequate to support a finding of employer liability.<sup>28</sup> The Court, without deciding that the *McDonnell Douglas* burden-shifting framework applies to age discrimination claims, affirmatively answered that question both in general terms and as applied to the case.<sup>29</sup>

Reeves presented a prima facie case for discrimination by showing he was at least forty years old when he was fired from his position as a manufacturing supervisor; he was otherwise qualified for the position; he was discharged; and his three successors in the position were all in their thirties.<sup>30</sup> Sanderson Plumbing met its burden of production by explaining that it terminated Reeves for failing to maintain accurate attendance records.<sup>31</sup> Reeves presented rebuttal evidence that he maintained accurate records and that the true decisionmaker behind the termination had directed disparaging age-based comments at Reeves.<sup>32</sup>

A jury returned a verdict for Reeves, but the Fifth Circuit reversed the decision.<sup>33</sup> The Fifth Circuit acknowledged the likelihood that a reasonable jury could have found Sanderson Plumbing's stated employment decision to be

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24. *See id.* at 979.

25. *See id.* at 979-80.

26. *See id.* at 980.

27. 530 U.S. 133 (2000).

28. *See id.* at 2104.

29. *See id.* at 2105, 2108, 2110.

30. *See id.* at 2106.

31. *See id.* at 2103-04.

32. *See id.* at 2107, 2110-11.

33. *See id.* at 2104.



pretextual.<sup>34</sup> Nonetheless, it held that the trial court erred in denying the employer judgment as a matter of law because the plaintiff presented insufficient evidence that he had been discharged because of his age.<sup>35</sup>

Justice O'Connor, writing for a unanimous U.S. Supreme Court, disagreed, stating that "[t]he ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination."<sup>36</sup> Circumstantial proof that the employer's explanation is not believable may be sufficiently persuasive to allow a trier of fact to reasonably infer that the employer is covering up discriminatory intent.<sup>37</sup> Such an inference may be justified if the employer, who is most able to give the actual reason for the action, has offered a reason that lacks credibility.<sup>38</sup> Factors to determine whether a court should grant judgment as a matter of law include the strength of the plaintiff's prima facie case, the probative value of the proof challenging the credibility of the employer's stated justification, and other relevant evidence.<sup>39</sup>

Some Indiana observers viewed *Reeves* as a significant victory for plaintiffs struggling to survive summary judgment.<sup>40</sup> This optimism abated two months later when the Seventh Circuit handed down *Kulumani v. Blue Cross Blue Shield Assoc.*,<sup>41</sup> applying *Reeves* in the context of a national origin discrimination case.<sup>42</sup> Plaintiff Kulumani's manager identified three of Kulumani's co-workers for termination during a company-wide reduction in the workforce, based on seniority and performance.<sup>43</sup> When the company's human resources director overrode the decision and released Kulumani instead of one of the manager's nominees, Kulumani described the action as "suspicious" and therefore pretextual.<sup>44</sup>

However, the Seventh Circuit said that "'pretext for discrimination' means more than an unusual act; it means something worse than a business error; [it]

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34. *See id.*

35. *See id.* The Fifth Circuit found against *Reeves* for several reasons: the age-based comments did not occur in the direct context of the plaintiff's discharge; there was no evidence that two other persons who recommended *Reeves*' termination were motivated by age; the two decisionmakers were over fifty years of age; two other supervisors in *Reeves*' area were also accused of faulty recordkeeping; and the employer filled several open management slots with persons over fifty years of age following *Reeves*' discharge. *See id.*

36. *Id.* at 2111.

37. *See id.* at 2108.

38. *See id.* at 2108-09.

39. *See id.* at 2109.

40. *See, e.g.,* Tim A. Baker, *Supreme Court Decision Eases Burden for Discrimination Plaintiffs*, IND. LAW., July 19, 2000, at 4.

41. 224 F.3d 681 (7th Cir. 2000).

42. *See, e.g.,* Tim A. Baker, *7th Circuit Revisits Pretext Following Supreme Court Ruling*, IND. LAW., Oct. 11, 2000, at 4.

43. *See Kulumani*, 224 F.3d at 683.

44. *See id.* at 683-84.



means deceit used to cover one's tracks."<sup>45</sup> Kulumani's evidence showed an unusual intervention but fell short of the requirement of *Reeves*, which is "a dishonest explanation, a lie rather than an oddity or error."<sup>46</sup> Therefore, the Seventh Circuit affirmed summary judgment for the employer on the merits,<sup>47</sup> making it clear that Indiana employees claiming employment discrimination under the *McDonnell Douglas* approach still face a substantial evidentiary hurdle in order to earn the right to a jury decision on the merits.

### III. TITLE VII DEVELOPMENTS

#### A. Harassment: What Conduct Qualifies?

*Holman v. State of Indiana*<sup>48</sup> presented the rare circumstance of true "equal opportunity harassment," which the Seventh Circuit held does not fall within the ambit of Title VII of the Civil Rights Act of 1964.<sup>49</sup> The Holmans, a married couple working maintenance for the state transportation department, both experienced inappropriate advances from their shop foreman. The foreman touched Karen Holman's body, stood inappropriately close to her, asked her for sex and directed sexist comments at her. He also grabbed Steven Holman's head while requesting sexual favors.<sup>50</sup>

The court noted that "the touchstone of Title VII is . . . discrimination or disparate treatment" based on gender.<sup>51</sup> Quoting *Oncale v. Sundowner Offshore Services, Inc.*,<sup>52</sup> the court identified the critical Title VII issue, for either same- or opposite-sex harassment, as "whether members of one sex are exposed to disadvantageous terms or conditions of employment *to which members of the other sex are not exposed*."<sup>53</sup> The court acknowledged the concern that exempting "equal opportunity harassers" could encourage these miscreants to gain immunity by harassing people of both sexes, even though only one sex was the preferred target.<sup>54</sup> However, the court considered that strategy unlikely, considering other potential penalties such as employer disciplinary action and state tort law liability.<sup>55</sup>

Judge Evans wrote separately to harmonize the holding with *Oncale*,<sup>56</sup> which involved a single-sex workplace. He noted that an equal opportunity harasser

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45. *Id.* at 684.

46. *Id.* at 685.

47. *See id.*

48. 211 F.3d 399 (7th Cir.), *cert. denied*, 121 S. Ct. 191 (2000).

49. *See id.* at 401; 42 U.S.C. § 2000e (2000).

50. *See Holman*, 211 F.3d at 401.

51. *Id.* at 402.

52. 523 U.S. 75 (1998).

53. *Holman*, 233 F.3d at 403 (emphasis added) (quoting *Oncale*, 523 U.S. at 80).

54. *See id.* at 404.

55. *See id.*

56. *See id.* at 407 (Evans, J., concurring).



might engage in such sex-specific and derogatory behavior, as was demonstrated in *Oncale*, that the plaintiff could prove discrimination against one or the other sex.<sup>57</sup>

Another case decided during the survey period reaffirmed that Title VII prohibits discrimination based on sex, but does not prohibit discrimination based purely on sexual orientation. In *Hamner v. St. Vincent Hospital and Health Care Center, Inc.*,<sup>58</sup> Hamner, a homosexual nurse, complained that his supervisor's superior had screamed at him, refused to acknowledge or communicate with him, and harassed him by lisping, making wrist-flipping motions, and joking about homosexuality.<sup>59</sup> The hospital's stated reason for terminating the nurse's employment was his alleged willful falsification of a patient's record. However, Hamner claimed he was terminated in retaliation for filing a grievance concerning this alleged discrimination based on sexual orientation.<sup>60</sup>

The court said that Hamner's claim might have prevailed had he shown that the harasser treated all male nurses as homosexuals, or that he harassed only male and not female homosexual nurses.<sup>61</sup> However, because Hamner did not claim discrimination based on gender, and only claimed discrimination based on his sexual orientation, his case was insufficient as a matter of law.<sup>62</sup>

This stance is consistent with the Seventh Circuit's reputation for being relatively tough on employment discrimination plaintiffs. The 1993 decision in *Saxton v. American Telephone & Telegraph Co.*,<sup>63</sup> which has been a favorite citation of defense counsel, played a critical role establishing that reputation. In *Saxton*, the plaintiff claimed that a co-worker had tried to kiss her, had touched her thigh without permission, and had jumped out of some bushes and attempted to grab her.<sup>64</sup> The Seventh Circuit rejected her argument that this conduct created a hostile environment, reasoning that it was not sufficiently severe.<sup>65</sup>

During the survey period, however, the Seventh Circuit clarified the limits of the *Saxton* holding. In *Hostetler v. Quality Dining, Inc.*,<sup>66</sup> a co-worker at Burger King grabbed Hostetler's face and "stuck his tongue down her throat."<sup>67</sup> The next day, when Hostetler resisted the same co-worker's attempt to kiss her, he started to unfasten her brassiere.<sup>68</sup> That same week, the co-worker told Hostetler in crude terms, while she was working at the counter, how effectively

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57. *See id.*

58. 224 F.3d 701 (7th Cir. 2000).

59. *See id.* at 703.

60. *See id.* at 704.

61. *See id.* at 707 n.5.

62. *See id.* at 707.

63. 10 F.3d 526 (7th Cir. 1993).

64. *See id.* at 528-29.

65. *See id.* at 533-34.

66. 218 F.3d 798 (7th Cir. 2000).

67. *Id.* at 801.

68. *See id.*



he could perform oral sex on her.<sup>69</sup>

The district court compared this conduct to that in *Saxton* and concluded that the conduct was not sufficiently severe to create a cause of action.<sup>70</sup> The Seventh Circuit disagreed.<sup>71</sup> Judge Rovner, writing for a unanimous panel, held that "the type of conduct at issue here falls on the actionable side of the line dividing abusive conduct from behavior that is merely vulgar or mildly offensive."<sup>72</sup> Two of the actions supporting the claim were "unwelcome, forcible physical contact[s] of a rather intimate nature,"<sup>73</sup> and even the crude remark, which could be considered an unwelcome sexual proposition, was "more than a casual obscenity."<sup>74</sup>

Because only a few acts were alleged, Judge Rovner discussed the types of physical activity that may give rise to an action for harassment. She described such acts as "[a] hand on the shoulder, a brief hug, or a peck on the cheek" as acts that are seldom severe enough to be actionable standing alone.<sup>75</sup> Even more crude or intimate acts such as "a hand on the thigh, a kiss on the lips, a pinch of the buttocks" may not be sufficiently "severe" in isolation.<sup>76</sup> However, the "physical, intimate, and forcible" acts alleged, which Rovner described as "invasive, humiliating, and threatening," albeit few in number, justified summary judgment for the employer.<sup>77</sup>

As a final note on the topic of what conduct constitutes harassment, the Seventh Circuit rejected a novel claim in *DeClue v. Central Illinois Light Co.*,<sup>78</sup> but only because the cause of action was ill-chosen.<sup>79</sup> Audrey DeClue worked as an electric company lineman, and traveled with her male crew members by truck between various job sites each day.<sup>80</sup> She argued that her employer's failure to provide her with restroom facilities created a hostile environment.<sup>81</sup> Her male colleagues customarily relieved themselves in open areas.<sup>82</sup>

Judge Posner, writing for the majority, found no discriminatory intent.<sup>83</sup> However, he acknowledged that DeClue might have had a successful claim under a disparate impact theory.<sup>84</sup> Judge Rovner dissented, noting that the company

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69. *See id.* at 802.

70. *See id.* at 805.

71. *See id.* at 812.

72. *Id.* at 807.

73. *Id.*

74. *Id.* at 808.

75. *Id.*

76. *Id.*

77. *Id.* at 808-09.

78. 223 F.3d 434 (7th Cir. 2000).

79. *See id.* at 437.

80. *See id.* at 435-36.

81. *See id.* at 437.

82. *See id.* at 436.

83. *See id.* at 436-37.

84. *See id.*



had offered DeClue no workable and non-stigmatizing alternatives, that DeClue's co-workers had made harassing comments, and that certain job sites afforded almost no privacy.<sup>85</sup>

The split among panel members, coupled with Judge Posner's observation that DeClue "has waived what may have been a perfectly good claim of sex discrimination" makes clear that employers who fail to make reasonable efforts to provide civilized restroom facilities to female employees should expect litigation and an uphill battle to justify their refusal.<sup>86</sup> Moreover, *DeClue* sounds another note of warning: plaintiffs' counsel must know the pleading alternatives in employment discrimination claims, and craft complaints wisely.

*B. Applying the Faragher/Ellerth Analysis: Did the Plaintiff Act Reasonably?*

In *Burlington Industries, Inc. v. Ellerth*<sup>87</sup> and *Faragher v. City of Boca Raton*,<sup>88</sup> the U.S. Supreme Court established that, under Title VII, employers are vicariously liable for hostile environment sexual harassment committed by the plaintiff's supervisor.<sup>89</sup> If the victim suffered no tangible adverse employment action, however, the employer may assert an affirmative defense requiring proof by a preponderance of two elements: "[1] that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and [2] that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."<sup>90</sup> The Seventh Circuit requires an employer to show three things to justify an instruction on the affirmative defense: "(1) the plaintiff endured no tangible employment action; (2) there is some evidence that the employer reasonably attempted to correct and prevent sexual harassment; and (3) there is some evidence that the employee unreasonably failed to utilize the avenues presented to prevent or correct the harassment."<sup>91</sup>

The Seventh Circuit decided three cases during the survey period that clarify the second prong of the *Faragher/Ellerth* test, whether the plaintiff acted reasonably. In *Savino v. C. P. Hall Co.*,<sup>92</sup> the plaintiff argued that this "avoidable consequences" doctrine should allow a defendant who successfully asserts the affirmative defense a reduction in damages owed, but not full absolution from liability.<sup>93</sup> The Seventh Circuit disagreed, noting that regardless of how the avoidable consequences doctrine operates in tort law, the U.S. Supreme Court made clear in *Faragher* that "unreasonable foot-dragging" by the plaintiff will

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85. *See id.* at 439 (Rovner, J., dissenting).

86. *Id.* at 437.

87. 524 U.S. 742 (1998).

88. 524 U.S. 775 (1998).

89. *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808.

90. *Ellerth*, 524 U.S. at 765, *Faragher*, 524 U.S. at 807.

91. *Savino v. C.P. Hall Co.*, 199 F.3d 925, 932 (7th Cir. 1999).

92. *Id.* at 925.

93. *Id.*



at least reduce damages and may allow the employer to avoid liability altogether.<sup>94</sup> The only adverse action plaintiff Savino could identify after she allegedly suffered sexual advances by her supervisor was an office relocation, which did not represent the type of substantial detriment contemplated in *Faragher* and *Ellerth*.<sup>95</sup> Also, Savino's complaints were incomplete and delayed.<sup>96</sup> Therefore, the court affirmed a jury verdict for the employer.<sup>97</sup>

In *Hill v. American General Finance, Inc.*,<sup>98</sup> the Seventh Circuit affirmed summary judgment for the employer on a sexual and racial harassment claim.<sup>99</sup> One issue raised on appeal was whether the employer had adequately communicated its sexual harassment policy.<sup>100</sup> The company had a general policy of complying with the equal opportunity laws and a policy statement that prohibited sexual harassment.<sup>101</sup> A separate memorandum outlined a complaint procedure. A company official testified that the policies were kept in notebooks in a "public access type place" within each branch office, and plaintiff Hill admitted that she knew the company had a human resource group responsible for policing employee sexual or racial harassment.<sup>102</sup>

The panel majority found this evidence sufficient, but Judge Wood dissented, arguing that the employer had not established its affirmative defense based upon undisputed facts.<sup>103</sup> Judge Wood questioned both the adequacy of the policies and of their distribution, observing that "[e]mployees cannot be expected to go around opening up all sorts of unmarked binders, to see if by any chance they might contain the company's harassment policy."<sup>104</sup> Therefore, Judge Wood did not agree with the other panel members' conclusion that Hill's failure to report the harassment was unreasonable as a matter of law.<sup>105</sup>

In the third case dealing with the *Faragher/Ellerth* affirmative defense, *Johnson v. West*,<sup>106</sup> the Seventh Circuit established who bears the burden of proof regarding a plaintiff's failure to report harassment.<sup>107</sup> Plaintiff Johnson had waited nearly a year to report alleged acts of harassment by her supervisor to any high-level manager qualified to speak for the employer.<sup>108</sup> At her bench trial, she unsuccessfully offered evidence of threats, verbal abuse, and other intimidation

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94. *Id.*

95. *See id.* at 932-33, 933 n.8.

96. *See id.* at 933-34.

97. *See id.* at 929.

98. 218 F.3d 639 (7th Cir. 2000).

99. *See id.* at 645.

100. *See id.* at 643.

101. *See id.* at 643-44.

102. *Id.* at 644.

103. *See id.* at 646 (Wood, J., dissenting in part).

104. *Id.* at 647.

105. *See id.*

106. 218 F.3d 725 (7th Cir. 2000).

107. *See id.* at 731-32.

108. *See id.* at 728, 732.



by her supervisor, and explained that she delayed reporting his sexual advances out of fear that she would lose her job.<sup>109</sup> The court remanded for consideration of whether Johnson had acted reasonably, and placed the burden on the employer to prove that she had not.<sup>110</sup>

*C. What Is an "Adverse Employment Action"?*

An actionable claim for retaliation or discrimination requires that the plaintiff prove that he or she has suffered some adverse employment action.<sup>111</sup> In *Ribando v. United Airlines, Inc.*,<sup>112</sup> the Seventh Circuit gave examples of material changes that might qualify as adverse actions, including termination or demotion accompanied by a wage or salary cut, a reduction in title, a material benefit loss, significantly lessened job responsibilities, or other "indices that might be unique to a particular situation."<sup>113</sup> Plaintiff Ribando claimed that a letter of concern, placed in her personnel file after a male employee accused her of making a harassing remark, was an adverse action as defined under Title VII,<sup>114</sup> but the court held that her complaint came nowhere close to the severity required to be actionable.<sup>115</sup> Similarly, as mentioned above, the Seventh Circuit held in *Savino v. C. P. Hall Co.*<sup>116</sup> that being moved to another floor of the office is not a tangible employment action in the *Faragher/Elzerth* sense.<sup>117</sup>

The most novel claim of adverse action during the survey period arose in *Cullom v. Brown*.<sup>118</sup> Plaintiff Cullom, a staffing specialist at a Veterans Administration hospital, filed several EEOC discrimination complaints.<sup>119</sup> In an effort to avoid further complaints, hospital management ordered Cullom's supervisor to give Cullom better performance ratings than he deserved. Had Cullom received more accurate (i.e., more critical) appraisals, he would have been eligible for remedial programs which, he claimed, would have earned him a promotion. His claimed adverse action, therefore, was inflated performance ratings. He succeeded in persuading the district court, which awarded him \$1500

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109. *See id.* at 727-28, 732.

110. *See id.* at 731-32. The court also remanded for additional legal analysis on a retaliatory discharge claim. *See id.* at 733.

111. *See Ribando v. United Airlines, Inc.*, 200 F.3d 507, 510 (7th Cir. 1999) (citations omitted).

112. *Id.* at 507.

113. *Id.* at 511 (quoting *Crady v. Liberty Nat'l Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993)).

114. *See id.* at 509.

115. *See id.* at 509, 511 (citing *Smart v. Ball St. Univ.*, 89 F.3d 437, 441 (7th Cir. 1996) (holding negative performance appraisals, standing alone, are not actionable adverse actions)).

116. 199 F.3d 925 (7th Cir. 1999).

117. *See id.* at 933.

118. 209 F.3d 1035 (7th Cir. 2000).

119. *See id.* at 1037.



damages plus fees and costs.<sup>120</sup>

Although the Seventh Circuit did not condone the hospital's "poor and even dishonest policy,"<sup>121</sup> it disagreed that Cullom suffered actionable retaliation, stating that "while Title VII prevents employers from punishing their employees for complaining about discrimination, it does not prevent an employer from unjustifiably rewarding an employee to avoid a discrimination claim."<sup>122</sup> Overly positive performance ratings and failure to impose probation and remedial training are not adverse.<sup>123</sup> Although failure to promote is an adverse action, the district court erred in concluding that Cullom proved that had he been put on probation, he would have been promoted sooner. Given Cullom's performance history, the Seventh Circuit found no evidence that he would have successfully completed the remedial program.<sup>124</sup> Even if he had, he would only have been qualified to continue in his former position, not to advance to a position requiring greater skills.<sup>125</sup> The court concluded that "[a]s a policy matter, the VA's behavior is indefensible. . . . But, Title VII liability does not turn on ill-advised personnel decisions."<sup>126</sup>

The Seventh Circuit recognized in *Simpson v. Borg-Warner Automotive, Inc.*<sup>127</sup> that constructive demotion, like constructive discharge, may be an adverse action, although the plaintiff's claim did not succeed.<sup>128</sup> Plaintiff Simpson, a manufacturing supervisor, sought and received a downgrade to a production line position.<sup>129</sup> She claimed that her supervisor had made her working environment intolerable because of her sex, which forced her to seek demotion, although the employer pointed out that it had offered her a transfer to a different supervisory position away from the offending supervisor.<sup>130</sup>

The court noted that constructive demotion analysis is similar to constructive discharge analysis: the plaintiff must prove that unlawful discrimination made his or her working conditions so intolerable that a reasonable person would have had no choice but to resign or seek demotion.<sup>131</sup> One difference is that a resignation removes one from the unbearable situation completely, while a demoted employee who remains in proximity to the offensive work conditions might have difficulty characterizing the situation as truly intolerable.<sup>132</sup>

Applying this analysis, the court found only two of Simpson's numerous

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120. *See id.*

121. *Id.*

122. *Id.* at 1041 (citing 42 U.S.C. § 2000e-3(a) (1994)).

123. *See id.*

124. *See id.* at 1043.

125. *See id.* at 1044.

126. *Id.* (citation omitted).

127. 196 F.3d 873 (7th Cir. 1999).

128. *See id.* at 876.

129. *See id.* at 874.

130. *See id.* at 876.

131. *See id.* at 876-77.

132. *See id.* at 876.



complaints persuasive.<sup>133</sup> The first was her supervisor's delay in terminating an employee who threatened Simpson; the second was an order, later rescinded, that Simpson take a basic skills test.<sup>134</sup> Because these claims did not constitute intolerable working conditions, Simpson's demotion was not an adverse employment action.<sup>135</sup> Accordingly, the Seventh Circuit affirmed summary judgment for the employer.<sup>136</sup>

In *Stockett v. Muncie Indiana Transit System*,<sup>137</sup> the court again found an employment action potentially adverse although, as in *Simpson*, the plaintiff failed to prove his case.<sup>138</sup> The Transit System received an anonymous report that Stockett, a bus driver, was seen smoking crack cocaine.<sup>139</sup> A supervisor trained to recognize signs of drug or alcohol influence observed Stockett during a meeting called to investigate a complaint of sexual harassment and noted Stockett's red eyes and uncharacteristically calm demeanor.<sup>140</sup> Management ordered Stockett to undergo drug testing in accordance with company policy and terminated him based on the test's positive result. Stockett claimed racial discrimination, pointing to a white employee who, he alleged, received more favorable treatment.<sup>141</sup>

The court acknowledged that employment conditions designed to harass and humiliate based on race are actionable adverse employment actions.<sup>142</sup> In particular, a drug test can be a "badge of shame."<sup>143</sup> Therefore, if a drug test is not administered in a routine fashion following standard and legitimate employer practices, an order to submit to such a test may be actionable.<sup>144</sup> Here, however, the employer applied its policy evenhandedly.<sup>145</sup> The white employee, cited as receiving more favorable treatment, was observed by a trained supervisor, as was Stockett, but in the white employee's case that supervisor saw no signs of drug use to justify ordering a drug test.<sup>146</sup> Therefore, Stockett failed to make out a *prima facie* case of racial discrimination.<sup>147</sup>

The requirement of an adverse employment action applies in other statutes as well as Title VII, including the Age Discrimination in Employment Act

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133. *See id.* at 877.

134. *See id.* at 877-78.

135. *See id.* at 878.

136. *See id.*

137. 221 F.3d 997 (7th Cir. 2000).

138. *See id.* at 1002-03.

139. *See id.* at 999.

140. *See id.* at 999-1000.

141. *See id.* at 1000.

142. *See id.* at 1001.

143. *Id.* at 1001 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995)).

144. *See id.* at 1001-02.

145. *See id.* at 1002.

146. *See id.*

147. *See id.* at 1002-03.



(ADEA)<sup>148</sup> and the Americans with Disabilities Act (ADA).<sup>149</sup> In *Hunt v. City of Markham*,<sup>150</sup> the plaintiffs asserted an age discrimination claim under the ADEA and a race discrimination claim under the Civil Rights Act of 1866.<sup>151</sup> The court held that both statutes require proof of an adverse employment action, which in this case was the denial of a pay raise.<sup>152</sup> The Seventh Circuit had previously held that denial of a bonus was not an adverse action, at least not under Title VII.<sup>153</sup> However, the court distinguished raises, which are customary for satisfactory workers, from bonuses, which are entirely discretionary and sporadic.<sup>154</sup> It noted that raises are necessary to enable real wages to keep up with inflation, and concluded that the denial of a raise is more likely than denial of a bonus to reflect impermissible motivation.<sup>155</sup>

#### D. Standing for Employment Testers

*Kyles v. J.K. Guardian Security Services, Inc.*<sup>156</sup> is a significant decision establishing that, in the Seventh Circuit, employment "testers" have standing to bring suit under Title VII.<sup>157</sup> The African-American plaintiffs, Kyra Kyles and Lolita Pierce, worked for the Chicago Legal Assistance Foundation and applied for a receptionist position with the defendant.<sup>158</sup> Although each of their white counterparts received a job offer, neither made it past the first interview.<sup>159</sup> They sued under both Title VII and Section 1 of the Civil Rights Act of 1866.<sup>160</sup> The district court entered summary judgment for the employer on both claims, holding that testers lack standing because they have no genuine interest in employment.<sup>161</sup>

The Seventh Circuit looked to housing discrimination law for guidance, recognizing that Title VIII of the Fair Housing Act<sup>162</sup> is functionally equivalent to Title VII and that "the provisions of these two statutes are given like

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148. See 29 U.S.C. § 621 (2000).

149. See 42 U.S.C. § 12101 (2000).

150. 219 F.3d 649 (7th Cir. 2000).

151. See *id.* at 653.

152. See *id.* at 653-54.

153. See *id.* at 654 (citing *Miller v. Am. Fam. Mut. Ins. Co.*, 203 F.3d 997, 1006 (7th Cir. 2000)).

154. See *id.*

155. See *id.* at 654.

156. 222 F.3d 289 (7th Cir. 2000).

157. See *id.* at 292. As the court explained, a "tester" in the employment context is "an individual who, without the intent to accept an offer of employment, poses as a job applicant in order to gather evidence of discriminatory hiring practices." *Id.*

158. See *id.* at 291-92.

159. See *id.* at 292.

160. See *id.* (citing 42 U.S.C. § 1981 (2000)).

161. See *id.*

162. See 42 U.S.C. § 3601 (The Civil Rights Act of 1968).



construction and application.”<sup>163</sup> The U.S. Supreme Court has held that regardless of the intent behind a housing availability inquiry, any person given false information has standing to sue.<sup>164</sup> The Seventh Circuit later applied the same logic to a claim of racial steering in housing and held that the testers had standing.<sup>165</sup>

The Seventh Circuit recognized that the statutory language differs between Title VII and the Fair Housing Act.<sup>166</sup> The Fair Housing Act makes it unlawful “[t]o represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.”<sup>167</sup> Title VII has no comparable provision.<sup>168</sup> However, both statutes are broadly directed toward prohibiting discrimination, both authorize individuals to act as “private attorneys general” to enforce the prohibitions, and both reflect a congressional intent to confer the broadest possible standing under Article III of the U.S. Constitution.<sup>169</sup>

Judge Rovner, writing for a unanimous panel, looked to the Title VII language making it unlawful “to limit, segregate, or classify . . . employees or applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee . . . because of such individual’s race . . . .”<sup>170</sup> A job applicant who is turned away based on race has suffered the exact injury described in the statute, even if the only harm suffered is the statutory violation.<sup>171</sup> Also, a strong public interest underlies Title VII’s prohibitions, and testers advance that interest by providing convincing evidence that would otherwise be difficult to obtain.<sup>172</sup>

Although the Seventh Circuit found standing for testers in Title VII suits, it reached a different conclusion concerning the Civil Rights Act of 1866, which prohibits discrimination on the basis of race in the making and enforcement of private and public contracts.<sup>173</sup> Because the testers had no intention to enter into a contract of employment, they suffered no injury within the scope of that statute.<sup>174</sup>

The *Kyles* decision gives legal force to a position taken by the EEOC since 1990,<sup>175</sup> and provides organizations that wage war against employment

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163. *Kyles*, 222 F.3d at 295.

164. *See id.* at 296 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982)).

165. *See Kyles*, 222 F.3d at 296-97 (citing *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990)).

166. *See id.* at 297.

167. 42 U.S.C. § 3604(d) (2000).

168. *See Kyles*, 222 F.3d at 297.

169. *Id.* at 297 (citation omitted).

170. *Id.* at 298 (quoting 42 U.S.C. § 2000e-2(a)(2) (2000)).

171. *See id.*

172. *See id.* at 298-99.

173. *See id.* at 301 (citing *Runyon v. McCrary*, 427 U.S. 160, 168 (1976)).

174. *See id.* at 302.

175. *See id.* at 299.



discrimination a very powerful tool. By using testers, such groups may collect objective evidence that a decisionmaker's stated reason for rejecting a protected-class applicant is pretextual. Employers would be well-advised to review and standardize their job applicant screening process, document the reasons why those hired are most qualified, and monitor to make sure that decisionmaking criteria are being consistently applied.

*E. Collective Bargaining Agreements as State-of-Mind Evidence*

On September 6, 2000, the Seventh Circuit granted rehearing en banc in *Equal Employment Opportunity Commission v. Indiana Bell Telephone Co.*<sup>176</sup> This case is worth watching. The EEOC, representing several female employees of defendant Ameritech, charged that employee Gary Amos committed numerous acts of sexual harassment and that Ameritech failed to act promptly to address the harassment.<sup>177</sup> Before the trial began, the district court ruled that Ameritech could not present testimony that Amos' eventual termination was delayed due to concerns about violating the "just cause" provision of Ameritech's collective bargaining agreement.<sup>178</sup> The district court stated in its order that "any concerns by an employer that an arbitrator might undo the discipline it has meted out for misconduct does not excuse taking no, or very little, action when [Title VII] requires them [sic] to act promptly to halt any violations of its provisions."<sup>179</sup> The jury awarded a total of \$1,050,000 in punitive damages, which the court reduced to \$635,000.<sup>180</sup>

A divided Seventh Circuit panel initially held that the district court erred in refusing to allow the evidence regarding the collective bargaining agreement.<sup>181</sup> The majority noted that a plaintiff seeking punitive damages must prove that the defendant employer acted with malice or reckless indifference to the employee's federally protected rights.<sup>182</sup> Obligations under Title VII do not always trump labor agreement obligations; for example, an employer need not violate a bargained-for seniority system to accommodate religious observance.<sup>183</sup> Therefore, evidence of the union agreement was factually relevant to state of mind, and was not irrelevant as a matter of law.<sup>184</sup> Furthermore, the error was not harmless, because it prevented Ameritech decisionmakers from testifying completely about the reasons for the timing of Amos' termination.<sup>185</sup> The size

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176. 214 F.3d 813 (7th Cir. 2000), *vacated and reh'g en banc granted* by No. 99-1155, 2000 U.S. App. LEXIS 22797 (7th Cir. Sept. 6, 2000).

177. *See id.* at 816.

178. *See id.* at 819.

179. *Id.*

180. *See id.* at 820.

181. *See id.* at 825.

182. *See id.*

183. *See id.* at 823.

184. *See id.* at 824.

185. *See id.* at 824-25.



of the punitive damages award, which vastly exceeded the \$15,000 jury award for compensatory damages, further underscored the importance of any potential evidence on the central issue of the defendant's state of mind.<sup>186</sup>

Judge Rovner, in dissent, agreed with District Court Judge McKinney that an employer's duty to protect workers from harassment under Title VII should take precedence over any conflicting collective bargaining provision.<sup>187</sup> After reviewing the "pattern of inaction in the face of Amos' unrelenting misconduct," Judge Rovner acerbically observed that "Ameritech has won . . . the right to invoke the collective bargaining agreement as an excuse for sitting on its hands while Amos kept on terrorizing his female colleagues."<sup>188</sup>

The Seventh Circuit's ultimate determination will interest employers who are caught between the rock of a collective bargaining agreement and the hard place of potential liability for sexual harassment under Title VII. Regardless of the outcome, it should create an increased sense of urgency for employers faced with sexual harassment complaints. When Ameritech finally decided that Amos should be punished for one of his harassing episodes, the thirty-day disciplinary action period specified in the union agreement had expired. Ameritech therefore deferred any discipline out of concern that any action against Amos would be grieved by the union and eventually be reversed by an arbitrator.<sup>189</sup> Even if Ameritech ultimately succeeds in getting the punitive damage award reversed, the delay that created the dilemma between statutory and contractual obligations has undoubtedly generated substantial business costs in the form of litigation fees and expenses and lost managerial time.

#### IV. THE AMERICANS WITH DISABILITIES ACT

In 1992, the EEOC began enforcing the Americans With Disabilities Act (ADA).<sup>190</sup> Within one year, disability charges accounted for seventeen percent of all EEOC charges processed. By fiscal year 2000, that figure rose to twenty percent.<sup>191</sup> The voluminous claim activity gave the Seventh Circuit the opportunity to address a variety of ADA issues during the survey period.

##### *A. Hostile Environment Claims and the ADA*

One notable, although unsurprising, development was in *Silk v. City of Chicago*.<sup>192</sup> In *Silk*, the Seventh Circuit edged closer to acknowledging the viability of hostile environment claims under the ADA. However, the plaintiff's evidence was insufficient to survive summary judgment, and the court stopped short of affirmatively recognizing the cause of action and instead assumed

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186. *See id.* at 825.

187. *See id.* at 826 (Rovner, J., concurring in part and dissenting in part).

188. *Id.*

189. *See id.* at 825.

190. *See* CHARGE STATISTICS, *supra* note 20.

191. *See id.*

192. 194 F.3d 788 (7th Cir. 1999).



without deciding that such a claim is cognizable.<sup>193</sup>

In *Silk*, a Chicago police officer developed sleep apnea, which the police department accommodated by allowing Silk to work only the day shift.<sup>194</sup> Following a Title VII-type approach, the Seventh Circuit required Silk to "demonstrate that a rational trier of fact could find that his workplace is permeated with discriminatory conduct—intimidation, ridicule, insult—that is sufficiently severe or pervasive to alter the conditions of his employment."<sup>195</sup> That degree of abusiveness is assessed from both an objective and subjective viewpoint.<sup>196</sup>

Silk failed to show that the examples of harassment he cited (such as an order to go home to get regulation footwear for an inspection, unreported but public taunts that Silk was a "medical abuser" and a "limited duty phony," and an unreported threat made by a known joker to bomb Silk's car)<sup>197</sup> rose to the level of a hostile environment.<sup>198</sup> Also, the only adverse employment action Silk proved was an order that he stop teaching an evening college class, pursuant to a departmental rule prohibiting officers on limited duty from working any second job inconsistent with the restrictions requiring limited duty.<sup>199</sup> The court found that this action was neither harassment nor retaliation based upon Silk's disability, and affirmed summary judgment for the department.<sup>200</sup>

Although the Seventh Circuit still has not formally recognized a cause of action for hostile environment harassment under the ADA, it edged toward doing so in *Silk* by delineating the above standards for analyzing such claims. Indiana employers should therefore expect to see more ADA hostile environment claims asserted. Employers must make sure that their staff members treat disabled workers with respect, or risk liability. Attorneys working with disabled plaintiffs should consider whether their clients suffered harassment and, if so, should proceed in the same manner as when dealing with a charge of harassment based on race or sex.

### *B. Perceived Disabilities*

In last year's survey issue, the most significant employment development reported was the U.S. Supreme Court's ruling that, in determining whether a person has a disability under the ADA, mitigating measures must be considered.<sup>201</sup> The Court held that a person who is not substantially limited in

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193. *See id.* at 803-04.

194. *See id.* at 795.

195. *Id.* at 804.

196. *See id.* at 805.

197. *Id.* at 796.

198. *See id.* at 807.

199. *See id.* at 806 n.17.

200. *See id.* at 794, 806, 808.

201. *See* *Murphy v. United Parcel Serv.*, 527 U.S. 516, 521 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999).



any major life activity when using a mitigating measure such as medication, corrective lenses, a prosthesis, or a hearing aid is not generally entitled to ADA protection.<sup>202</sup> For example, a nearsighted person who can see normally when using eyeglasses or contact lenses has no cause of action under the ADA merely because he or she is terminated because of the nearsightedness.<sup>203</sup> These decisions went against the EEOC's statutory interpretation and greatly reduced the number of viable ADA claimants.

The ADA is not, however, limited to people with actual disabilities. It also covers those with a record of a qualified impairment, or who are regarded by their employers as having a qualified impairment.<sup>204</sup> Persons who can no longer directly claim a covered disability may therefore argue that, although they did not have a condition that (as mitigated) limited them in a major life activity, their employers regarded them as having such a limiting disability. If successful, such plaintiffs qualify as disabled under the ADA.<sup>205</sup> The Seventh Circuit dealt with several such claims during the survey period, with summary judgment for the employer on the ADA claim affirmed in each case discussed below.<sup>206</sup>

In *Gorbitz v. Corvill, Inc.*,<sup>207</sup> the plaintiff, an accounting manager at a not-for-profit agency, suffered head and neck injuries in an automobile accident.<sup>208</sup> This resulted in frequent absences from her job to visit doctors and physical therapists.<sup>209</sup> Her employer's initial tolerance eventually wore thin, and she was asked to schedule appointments after 3:30 p.m. and to provide a weekly list of her medical appointments to the agency executive director.<sup>210</sup> After the agency terminated her for attitude problems, she filed an ADA claim, arguing that because agency management knew about the numerous medical appointments, she was regarded as disabled.<sup>211</sup>

The Seventh Circuit disagreed, stating that "it is well known that medical appointments, in and of themselves, do not signal the existence of a disability; doctors frequently prescribe physical therapy for those without any substantial limitations in a major life activity that rise to the level of a disability."<sup>212</sup> *Gorbitz* offered only speculation that agency management regarded her as disabled, which was not enough to raise a genuine issue of fact.<sup>213</sup>

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202. See *Sutton*, 527 U.S. at 488.

203. See *id.* at 488-89.

204. See 42 U.S.C. § 12102(2) (2000).

205. See *Sutton*, 527 U.S. at 489.

206. See *Moore v. J.B. Hunt Transp., Inc.*, 221 F.3d 944, 947 (7th Cir. 2000); *Wright v. Ill. Dep't of Corr.*, 204 F.3d 727, 728 (7th Cir. 2000); *Krocka v. City of Chicago*, 203 F.3d 507, 510 (7th Cir. 2000); *Gorbitz v. Corvill, Inc.*, 196 F.3d 879, 880 (7th Cir. 1999).

207. 196 F.3d at 879.

208. See *id.* at 880.

209. See *id.*

210. See *id.* at 880-81.

211. See *id.* at 881.

212. *Id.* at 882.

213. See *id.*



In *Krocka v. City of Chicago*,<sup>214</sup> a police department learned that Krocka, a veteran officer, was taking Prozac to alleviate depression.<sup>215</sup> The department ordered a physical and psychological evaluation to assess Krocka's continued fitness for duty, which revealed that Krocka exhibited neither symptoms of psychological illness nor side effects of the medication. Krocka returned to his regular duties subject to participation in the department's "Personnel Concerns Program" that included ongoing monitoring and, on one occasion, a test to measure the Prozac level in Krocka's blood.<sup>216</sup>

The district court concluded that, although Krocka suffered the impairment of severe depression, he was not substantially limited in any major life activity in his medicated state and was therefore not disabled under the ADA.<sup>217</sup> In its "regarded as" analysis, the Seventh Circuit distinguished between two types of claims.<sup>218</sup> An employer may erroneously believe that the employee has a substantially limiting impairment when the employee possesses no such impairment.<sup>219</sup> This was not Krocka's case, because he did in fact suffer from severe depression.<sup>220</sup> Or, as in Krocka's case, an employer may erroneously believe that an impairment is substantially limiting, when it is not.<sup>221</sup>

In support of his "regarded as" claim, Krocka argued that the medical evaluation and ongoing monitoring violated the ADA. The Seventh Circuit accepted that the monitoring was an adverse action, but focused on the fact that the department allowed Krocka to carry on his responsibilities without weapon-carrying or any other restrictions. Because Krocka performed all his regular duties, the court concluded, the department could not have regarded Krocka as substantially limited, despite his medicated state.<sup>222</sup> Furthermore, the medical evaluation and monitoring requirement was reasonable, especially given the significant safety concerns of police work, because it allowed the department to avoid uninformed assumptions regarding Krocka's fitness for duty.<sup>223</sup>

Plaintiff Wright, in *Wright v. Illinois Department of Corrections*,<sup>224</sup> was equally unsuccessful in asserting a "regarded as" claim.<sup>225</sup> Wright disclosed on his application for a prison guard position that he was a veteran with a service-related disability (an ankle injury that occurred during a volleyball game while he was serving in the Marine Corps).<sup>226</sup> Although Wright told his interviewer

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214. 203 F.3d 507 (7th Cir. 2000).

215. *See id.* at 511.

216. *Id.*

217. *See id.* at 513.

218. *Id.* at 513-14.

219. *See id.*

220. *See id.* at 514.

221. *See id.*

222. *See id.*

223. *See id.* at 515.

224. 204 F.3d 727 (7th Cir. 2000).

225. *See id.* at 732-33.

226. *See id.* at 728 & n.1.



that he could not run long distances, he passed a physical agility test and received a job offer. After he was hired, Wright learned in an orientation meeting that the correction officers' training academy included marching exercises. He announced that he could not participate, and the department withdrew his job offer.<sup>227</sup> After his state representative intervened, the department agreed to have a physician evaluate Wright's physical ability to do the job. However, when Wright arrived late for his appointment, it was canceled and never rescheduled.<sup>228</sup>

Although the department answered affirmatively to an interrogatory asking "whether Defendant considered Plaintiff to be disabled," a divided Seventh Circuit panel looked to the underlying circumstances.<sup>229</sup> The majority found that the department considered Wright qualified until Wright himself raised a doubt by indicating that he could not perform a required training exercise. The department first accepted Wright's word that he could not complete the task but then agreed to get a medical opinion after Wright asserted that he was physically qualified for the job itself. The court characterized the department's actions as a permissible effort to ascertain Wright's physical limitations rather than as regarding Wright as substantially impaired in a major life activity such as walking or caring for himself. Although the employer admittedly (and correctly) perceived Wright as unable to run long distances or to march, it did not regard him as substantially limited in ways contemplated by the ADA.<sup>230</sup>

The Seventh Circuit reached a similar conclusion in *Moore v. J.B. Hunt Transport, Inc.*<sup>231</sup> Moore suffered from rheumatoid arthritis, which caused him to move more slowly than most people. He obtained employment as a truck driver training instructor, and was assigned to ride along with students on public roadways and to stand outside trucks in an outdoor training area and direct student maneuvers such as backing and turning. Both the jolts and vibrations from riding with inexperienced drivers and cold, damp weather conditions aggravated Moore's condition. He requested reassignment as a classroom instructor but was denied that position because he was not the most qualified candidate. Moore lost his position and later found work elsewhere as a charter coach bus driver.<sup>232</sup>

Neither Moore's sensitivity to cold and damp weather nor the possibility of disabling but infrequent arthritis flare-ups foreclosed him from a wide range of positions for which he was qualified. Therefore, the Seventh Circuit concluded that Moore did not qualify as disabled under the ADA. Moore also could not prove that his employer regarded him as unqualified for a wide range of jobs; only that it regarded him as unqualified for two specific types of driver instruction.<sup>233</sup>

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227. *See id.*

228. *See id.*

229. *Id.* at 731.

230. *See id.* at 732-33.

231. 221 F.3d 944 (7th Cir. 2000).

232. *See id.* at 948-49.

233. *See id.* at 952-53.



### C. Substantial Limitation

As explained above, an ADA claimant must prove that her disability substantially limits her in some major life activity.<sup>234</sup> During the survey period, the Seventh Circuit rejected claims of substantial limitation in two cases. In *Schneiker v. Fortis Insurance Co.*,<sup>235</sup> the plaintiff suffered from depression and alcoholism, which were exacerbated when she worked under a particular supervisor. During a temporary reassignment under another supervisor, Schneiker's performance and ability to cope with her work situation improved. Fortis, Schneiker's employer, gave the plaintiff opportunities to interview for permanent positions in other departments, with special concessions such as exempting her from a restriction against pursuing more than one transfer opportunity at a time. Fortis also offered her a transfer to a position with lower pay but strong growth potential, which she refused.<sup>236</sup>

Schneiker claimed disability discrimination after she was terminated.<sup>237</sup> The Seventh Circuit, reaffirming prior holdings,<sup>238</sup> found that the record showed only that Schneiker's conditions impaired her ability to work with one particular supervisor.<sup>239</sup> However, such personality conflicts, even those serious enough to trigger depression, do not establish disability if the employee could perform the job under alternative supervision. Therefore, the court affirmed summary judgment for Fortis.<sup>240</sup>

In *Sinkler v. Midwest Property Management Ltd. Partnership*,<sup>241</sup> a regional sales manager suffered panic attacks when she drove a car anywhere beyond her home city of Kenosha, Wisconsin.<sup>242</sup> She claimed that she was fired because of her phobia, which substantially limited her ability to work, and that her employer failed to offer her a reasonable accommodation, such as approval to travel by air or train to out-of-town work assignments.<sup>243</sup> The Seventh Circuit agreed with the district court's ruling that despite Sinkler's phobia, she was still able to hold a broad range of other jobs.<sup>244</sup> The circuit court reasoned that although sales

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234. Alternatively, the claimant may show that she was regarded as having an impairment that substantially limited a major life activity, or that she had a record of an impairment that substantially limited a major life activity. See 42 U.S.C. § 12102(2) (2000).

235. 200 F.3d 1055 (7th Cir. 2000).

236. See *id.* at 1058.

237. See *id.* at 1059.

238. See *Weiler v. Household Fin. Corp.*, 101 F.3d 519 (7th Cir. 1996); see also *Palmer v. Circuit Court of Cook County*, 117 F.3d 351 (7th Cir. 1997).

239. See *Schneiker*, 200 F.3d at 1061.

240. See *id.* at 1062.

241. 209 F.3d 678 (7th Cir. 2000).

242. See *id.* at 681.

243. See *id.* at 682, 685.

244. See *id.* at 685. In fact, Sinkler was employed in the Kenosha area for thirty years before she began work at Midwest. She found work at Sears after her termination from Midwest. See *id.*



positions often require out-of-town travel, many such jobs required driving only in the Kenosha area. Moreover, other positions accessible by public transit or car-pool were available in the Chicago and Milwaukee metropolitan areas.<sup>245</sup> Therefore, the Seventh Circuit again affirmed summary judgment for the employer.<sup>246</sup>

#### *D. Failure to Accommodate*

Once an ADA plaintiff gets over the hurdle of proving a disability that substantially limits her in a major life activity, one form of claim she may bring is that her employer failed to reasonably accommodate that disability. The plaintiff in *Vollmert v. Wisconsin Department of Transportation*<sup>247</sup> asserted such a claim. Vollmert, who suffered from a learning disability and dyslexia, had been employed for twenty-one years by the Wisconsin Department of Transportation, where she processed applications for special license plates. When the department implemented a new computer system, Vollmert had difficulty becoming proficient with the system, although she received classroom and some individual instruction. She repeatedly asked basic questions, which trainers discouraged by telling her to refer to her notes. Subsequently, she fell behind in productivity.<sup>248</sup> Vollmert filed suit under the ADA after the department laterally transferred her to a position that limited her promotional opportunities.<sup>249</sup>

The district court dismissed the suit, holding that Vollmert failed to show that she could perform the essential job functions, even with accommodation.<sup>250</sup> The Seventh Circuit disagreed, giving greater credence to a rehabilitation expert report that Vollmert offered.<sup>251</sup> This report concluded that Vollmert could have become proficient in the processing position had she been given training appropriate for her disability.<sup>252</sup> The expert had based his opinion on Vollmert's narrative account, education, prior work experience, and aptitude tests. His report stated the facts supporting his conclusions.<sup>253</sup> He opined that Vollmert's learning was hindered by a variety of factors, including: the fact that she was still working under the old system while trying to learn the new one; her one-on-one training only totaled about four hours; the complex written training manual was not well-suited to her learning disabilities; and she needed the opportunity

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at 685-86.

245. See *id.* at 686.

246. See *id.* at 687.

247. 197 F.3d 293 (7th Cir. 1999).

248. See *id.* at 296.

249. See *id.* at 295-96.

250. See *id.* at 297-98.

251. See *id.* at 298-300.

252. See *id.* at 299.

253. See *id.* at 300. In other comparable cases, the Seventh Circuit has rejected reports that state only "naked conclusions." *Id.* at 298 (citations omitted).



to ask repetitive questions to successfully assimilate the information.<sup>254</sup>

Because the expert report created a genuine issue of fact as to whether Vollmert could learn the new system with proper training, Vollmert's transfer to a position with lesser advancement potential was not a reasonable accommodation as a matter of law. Moreover, Vollmert had requested a special tutor, and although one was likely available through another agency at no charge, the department failed to provide training geared toward Vollmert's disability. Based upon these findings court remanded the case for trial.<sup>255</sup>

The plaintiff in *Rehling v. City of Chicago*<sup>256</sup> was less successful. EEOC regulations recommend, although the ADA statute does not require, that employers engage in an "interactive process" with disabled persons to agree upon a reasonable accommodation.<sup>257</sup> Police Officer Rehling lost part of a leg as a result of an automobile accident and, after extended medical leave, asked to return to work on limited duty status in his former district. However, that district had no desk jobs available. The police department offered Rehling a reassignment to another unit, which Rehling declined because of transportation concerns, although he did not challenge the suitability of that position in his response to the employer's summary judgment motion.<sup>258</sup> The Seventh Circuit affirmed partial summary judgment for the employer because Rehling failed to show that any desk position was available in his old district, and because "a plaintiff cannot base a reasonable accommodation claim solely on the allegation that the employer failed to engage in an interactive process."<sup>259</sup>

#### *E. Other ADA Issues*

Two survey period cases offer guidance on the issue of damages. In the first, *Gile v. United Airlines, Inc.*,<sup>260</sup> the Seventh Circuit reversed an award of punitive damages in a failure-to-accommodate claim.<sup>261</sup> Gile, whose psychological disability was exacerbated by working nights, asked repeatedly but unsuccessfully for a shift change.<sup>262</sup> A jury awarded her \$200,000 in compensatory damages and \$500,000 in punitive damages, which the court reduced to \$300,000 as required under 42 U.S.C. § 1981a(b)(3).<sup>263</sup> Under the ADA, punitive damages require a "discriminatory practice . . . with malice or reckless indifference to the federally protected rights of an aggrieved

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254. *See id.* at 301.

255. *See id.* at 302.

256. 207 F.3d 1009 (7th Cir. 2000).

257. *Id.* at 1015 (citing 29 C.F.R. § 1630.2(O)(3) (2001)).

258. *See id.* at 1012-13, 1016-17.

259. *Id.* at 1016.

260. 213 F.3d 365 (7th Cir. 2000).

261. *See id.* at 376.

262. *See id.* at 369-70.

263. *See id.* at 371.



individual.”<sup>264</sup> The U.S. Supreme Court held in 1999 that “malice or reckless indifference” depends on the “employer’s knowledge that it may be acting in violation of federal law,” rather than the egregiousness of the employer’s misconduct.<sup>265</sup> Here, United refused to accommodate Gile because it mistakenly believed, based on a medical director’s assessment, that Gile suffered no disability.<sup>266</sup> Such refusal was negligent but not, according to the panel majority, a sufficiently reckless state of mind to justify punitive damages.<sup>267</sup>

*Pals v. Schepel Buick & GMC Truck, Inc.*<sup>268</sup> presents a cautionary tale for defense counsel. A used-car manager with muscular dystrophy sued for disability discrimination, requesting back wages, future wages, and mental distress.<sup>269</sup> He won a lump-sum compensatory damages jury award of \$1,050,000.<sup>270</sup> On appeal, the employer argued that 42 U.S.C. 1981a(b)(3), which limits ADA damages to \$300,000 for the largest employers, limited Schepel’s exposure to \$100,000 based on its staff size.<sup>271</sup> However, the Seventh Circuit determined that the ADA damage cap does not apply to back pay or front pay.<sup>272</sup> Because the jury used a general verdict form, and the employer’s attorneys failed to ask for a breakdown of damages, the court could not ascertain whether the award included more than \$100,000 for Pals’ mental distress.<sup>273</sup> Furthermore, the court held that front and back pay are equitable remedies to be decided by the judge under both Title VII and the ADA, and because neither party objected, both impliedly consented to the jury determination.<sup>274</sup> In the end, Pals retained the entire jury award.<sup>275</sup> The important lesson of this case is that defense counsel must insist on an itemization of Title VII or ADA jury awards, or risk losing the benefit of the cap on certain types of damages.

Another issue that the Seventh Circuit clarified was the interplay between the ADA and claims for Social Security disability benefits. In *Cleveland v. Policy Management Systems Corp.*,<sup>276</sup> the U.S. Supreme Court held that application for or receipt of Social Security Disability Insurance (SSDI) benefits does not automatically estop a recipient from pursuing an ADA claim, as long as the plaintiff adequately explains the apparent inconsistency.<sup>277</sup>

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264. *Id.* at 375 (citing 42 U.S.C. § 1981a(b)(1) (2000)).

265. *Id.*

266. *See id.* at 375-76.

267. *See id.* at 376.

268. 220 F.3d 495 (7th Cir. 2000).

269. *See id.* at 497, 499.

270. *See id.* at 499.

271. *See id.*; 42 U.S.C. § 1981a(b)(3) (2000).

272. *See Pals*, 220 F.3d at 499.

273. *See id.* at 500.

274. *See id.* at 500-01.

275. *See id.* at 501.

276. 526 U.S. 795 (1999).

277. *See id.* at 797-98. The ADA requires the plaintiff to prove that he or she can perform the essential functions of the position at issue, with or without a reasonable accommodation, which is



In *Feldman v. American Memorial Life Insurance Co.*,<sup>278</sup> the plaintiff incurred a work-related injury and filed for SSDI benefits, stating that she was "completely and totally disabled and [could not] perform any substantial gainful employment."<sup>279</sup> The Seventh Circuit reviewed various possible justifications for treating SSDI representations and ADA claims differently, such as a lapse of time between the SSDI application and ADA claim, during which the disability abated.<sup>280</sup> Here, however, none of these justifications applied. Therefore, the Seventh Circuit affirmed summary judgment for the employer, finding that Feldman had made contradictory and unreconciled assertions and that it would not "permit litigants to adopt an alternate story each time it advantages them to change the facts."<sup>281</sup> Because Feldman offered no direct explanation for the seeming contradiction, the court refused to assume that it could be resolved.<sup>282</sup>

A final holding came in *Equal Employment Opportunity Commission v. Humiston-Keeling, Inc.*,<sup>283</sup> in which the Seventh Circuit rejected an EEOC argument and affirmed summary judgment for the employer.<sup>284</sup> The plaintiff, a warehouse "picker," developed tennis elbow and could no longer do the lifting required in her job. She applied for several vacant internal clerical positions for which she was minimally qualified, but in each case was passed over for a more qualified applicant.<sup>285</sup> The EEOC argued that "reasonable accommodation" under the ADA required the employer to advance the plaintiff over a more qualified nondisabled person unless doing so presented provable "undue hardship."<sup>286</sup>

Judge Posner, writing for a unanimous panel, disagreed, noting that such a requirement could have perverse results, such as forcing an employer to give one disabled candidate preference over a more seriously disabled candidate, or to give preference to a white male disabled candidate over a more qualified female minority candidate.<sup>287</sup> The ADA, Judge Posner stated, does not require such "affirmative action with a vengeance."<sup>288</sup> While the Act does not allow an employer to reject the best-qualified applicant based on disability, it similarly does not require the hiring of a qualified but inferior candidate based on

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at apparent odds with the incapacity claim required for Social Security disability benefits. *See id.* at 802; *Albertson's, Inc. v. Kirkinburg*, 527 U.S. 555, 578-79 (1999) (quoting 42 U.S.C. § 12111(8)).

278. 196 F.3d 783 (7th Cir. 1999).

279. *Id.* at 786-88.

280. *See id.* at 790-91.

281. *Id.* at 791.

282. *See id.* at 792.

283. 227 F.3d 1024 (7th Cir. 2000).

284. *See id.* at 1025, 1029.

285. *See id.* at 1026-27.

286. *Id.* at 1027.

287. *See id.*

288. *Id.* at 1029.



disability.<sup>289</sup> Furthermore, Judge Posner noted that in most cases a transfer from a warehouse job to a less physically strenuous office job is usually a promotion, and even the EEOC acknowledges that the ADA does not require promotion as a reasonable accommodation.<sup>290</sup>

## V. THE AGE DISCRIMINATION IN EMPLOYMENT ACT

When an employer lays employees off in a workforce reduction ("RIF," for Reduction In Force), age discrimination actions often arise. During the survey period the Seventh Circuit addressed several RIF cases. In *Cullen v. Olin Corp.*<sup>291</sup> the Seventh Circuit reversed a jury award totaling \$850,000 and remanded for a new trial because the trial court abused its discretion in allowing evidence that an employee who assumed part of a RIF victim's job responsibilities failed to perform those duties satisfactorily thereafter.<sup>292</sup> The circuit court held that this evidence was irrelevant because it had no bearing on management's state of mind at the time it decided to terminate Cullen.<sup>293</sup>

The facts and holding of *Michas v. Health Cost Controls of Illinois, Inc.*<sup>294</sup> are unremarkable, but the court's review of the proof required in age discrimination claims involving RIFs is worth noting. A true RIF involves permanent elimination of certain positions.<sup>295</sup> The basic *McDonnell Douglas* approach to establishing a claim of intentional discrimination requires the plaintiff to prove that she belongs to a protected class, that she met reasonable performance expectations, that she suffered adverse employment action such as termination, and that her position remained open or was filled by someone not a member of the protected class.<sup>296</sup> In a RIF, a discrimination victim may be unable to prove the last element. Therefore, in the alternative, she must prove that similarly situated non-protected-class members received more favorable treatment. In making an age discrimination claim, she must show that she was similarly situated to younger employees who were retained.<sup>297</sup>

When a single employee is discharged and her responsibilities are absorbed by other employees so that the position is not filled, the Seventh Circuit has dubbed the action a "mini-RIF."<sup>298</sup> An employee with a unique position could not prevail under the basic RIF test, because she could not point to any other similarly situated employee who received better treatment. Therefore, the plaintiff must only show that employees who were not members of the protected

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289. See *id.* at 1028-29.

290. See *id.* at 1029.

291. 195 F.3d 317 (7th Cir. 1999), *cert. denied*, 529 U.S. 1020 (2000).

292. See *id.* at 319, 325.

293. See *id.* at 324.

294. 209 F.3d 687 (7th Cir. 2000).

295. See *id.* at 693.

296. See *id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

297. See *id.*

298. *Id.*



class absorbed her duties.<sup>299</sup> This returns one to the basic *McDonnell Douglas* analysis, because in both the RIF and mini-RIF scenarios the claimant's duties were absorbed by at least one other employee who was either specifically hired or previously employed, so that the plaintiff can show that a person or persons outside the protected class assumed her duties.<sup>300</sup> Therefore, in ascertaining whether to apply the basic *McDonnell Douglas* analysis or the alternative RIF analysis, counsel should focus on whether the plaintiff's responsibilities were absorbed by others, or whether they were eliminated entirely.<sup>301</sup>

The distinction described in *Michas* may not, however, be as clear-cut in the application as it sounds in theory. In *Michas*, the court described a mini-RIF as involving the discharge of only a single employee. However, in the earlier *Cullen* case, the court applied the mini-RIF analysis when it focused on whether and to whom any substantial portion of the claimant's responsibilities were reassigned, even in the context of a seventy-four-person layoff.<sup>302</sup> Because *Michas* indicates no intent to overrule *Cullen*, one could reasonably assume that the mini-RIF analysis, which parallels the basic *McDonnell Douglas* analysis, applies regardless of the overall extent of the workforce reduction when the plaintiff can identify an employee or employees who assumed her former job responsibilities.

Two post-survey period developments, both of which also involve RIFs, bear further monitoring. In *Adams v. Ameritech Services Inc.*,<sup>303</sup> a central issue is the admissibility of statistical evidence to show intentional age discrimination.<sup>304</sup> The plaintiffs, who were RIF victims, proffered expert reports that examined correlations between employees' ages and termination rates.<sup>305</sup> The district court refused to admit the reports for several reasons, including unreliability of the underlying information, lack of analysis of causation, lack of control for other variables, and likelihood of confusing the jury.<sup>306</sup> The Seventh Circuit remanded the case for reconsideration, pursuant to the *Daubert* standard, of whether the reports were "prepared in a reliable and statistically sound way, such that they contained relevant evidence."<sup>307</sup> The court held that regression analysis is not a requirement for admissibility, and a report may, if bolstered by other evidence, meet the *Daubert* standard even if it merely eliminates the possibility that it was pure chance that a RIF adversely affected employees protected under the ADEA more than others.<sup>308</sup>

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299. *See id.*

300. *See id.* at 693-94.

301. *See id.* at 694.

302. *See Cullen v. Olin Corp.*, 195 F.3d 317, 320 (7th Cir. 1999).

303. 231 F.3d 414 (7th Cir. 2000).

304. *See id.* at 422. The court noted that the Seventh Circuit does not recognize age discrimination claims based on disparate impact. *See id.*

305. *See id.* at 425.

306. *See id.* at 427.

307. *Id.* at 425.

308. *See id.* at 425, 427-28.



On December 11, 2000, the EEOC issued a final regulation<sup>309</sup> on the ADEA "tender back" rule, addressing the U.S. Supreme Court's 1998 decision in *Oubre v. Entergy Operations, Inc.*<sup>310</sup> The Older Workers Benefits Protection Act of 1990 (OWBPA)<sup>311</sup> amended the ADEA and, among other things, permitted employees to waive their ADEA rights in return for consideration such as increased severance or early retirement benefits. Such waivers are, however, governed by specific OWBPA requirements, such as a requirement that the waiver be written in understandable language.<sup>312</sup>

Prior to the EEOC's recent regulation, an employee who entered into a waiver agreement but thereafter sought to bring suit under the ADEA faced two obstacles from traditional contract law. First, the "tender back" rule required an individual who wished to challenge a waiver to first repay the consideration received for the waiver. Second, the "ratification" principle provided that an individual who failed to return the payment was deemed to have approved the waiver.<sup>313</sup> The final EEOC rule states that neither of these principles applies to ADEA waivers.<sup>314</sup> Therefore, employees who wish to challenge the validity of their ADEA waivers may do so without first repaying the amount received for signing the waiver. If the employee prevails in overturning the waiver, however, and then proves age discrimination and obtains a monetary award, the employer may be able to deduct the amount paid for the waiver in calculating the amount owed.<sup>315</sup>

## VI. OTHER FEDERAL STATUTES

### A. Family and Medical Leave Act

The most significant Seventh Circuit Family and Medical Leave Act (FMLA) decision during the survey period was *Dormeyer v. Comerica Bank-Illinois*,<sup>316</sup> which overruled an EEOC regulation. Plaintiff Dormeyer was excessively absent from her bank teller job, and after her twentieth unexcused absence in less than a year, the bank terminated her. Some of Dormeyer's absences occurred after she became pregnant and requested FMLA leave, for which she was ineligible because she had worked fewer than 1250 hours in the prior twelve months. The bank ignored Dormeyer's request for FMLA, and Dormeyer sued under an EEOC

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309. 29 C.F.R. § 1625.23 (2001).

310. 522 U.S. 422 (1998).

311. 29 U.S.C. § 626(f) (2000).

312. See *id.* § 626(f)(1)(A)-(G).

313. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, QUESTIONS AND ANSWERS: FINAL REGULATION ON "TENDER BACK" AND RELATED ISSUES CONCERNING ADEA WAIVERS, at <http://www.eeoc.gov/regs/tenderback-qanda.html> (last modified Dec. 11, 2000) [hereinafter QUESTIONS AND ANSWERS].

314. See 29 C.F.R. § 1625.23(a) (2001).

315. See *id.* § 1625.23(c); see also QUESTIONS AND ANSWERS, *supra* note 313.

316. 223 F.3d 579 (7th Cir. 2000).



regulation stating that if an employer fails to advise an employee who requests FMLA leave of her eligibility for the leave, the employee is deemed eligible for leave even if she would not otherwise have qualified.<sup>317</sup>

Judge Posner, writing for a unanimous panel, held that the EEOC cannot enact a rule that effectively cancels the FMLA's statutory eligibility conditions.<sup>318</sup> Furthermore, Judge Posner found the rule unreasonable in granting benefits to those who were never intended to receive them.<sup>319</sup> The court also rejected Dormeyer's claim of pregnancy discrimination, noting that although some of her absences were related to her pregnancy, she failed to show that the absences of nonpregnant employees were overlooked.<sup>320</sup>

*Rice v. Sunrise Express, Inc.*,<sup>321</sup> another significant Seventh Circuit survey period FMLA decision, examines the question of who bears the burden of proof to show a legitimate business reason for a termination that occurs during an FMLA leave. The district court instructed the jury that it was the defendant's burden to show that the plaintiff would have been terminated even if she had not been on leave.<sup>322</sup> Finding that the defendant had not satisfied this burden, the jury returned a verdict for plaintiff Rice.<sup>323</sup>

The Seventh Circuit, scrutinizing the statutory language of the FMLA, noted that a plaintiff's substantive rights under the act do not include entitlement to any right or benefit to which the employee would not have been entitled, had he not taken FMLA leave.<sup>324</sup> The panel majority held that the employee "always bears the ultimate burden of establishing the right to the benefit."<sup>325</sup> Rejecting the Department of Labor's interpretation as to the allocation of the burdens, the majority held that an employer wishing to claim that a benefit (such as reappointment to a position held prior to a leave) would have been unavailable regardless of the leave, bears only the burden of production. Once the employer has submitted evidence supporting the assertion, the employee bears the burden of proving, by a preponderance of the evidence, that she would have received the

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317. *See id.* at 581-82.

318. *See id.* The court left open the possibility that the regulation might be upheld if the plaintiff asserted detrimental reliance based on the employer's silence, and sought to estop the employer from denying leave based on reasonable reliance and resulting harm. *See id.*

319. *See id.* at 582-83.

320. *See id.* at 583. In dicta, Judge Posner went on to say that although disparate impact is a permissible liability theory under the Pregnancy Discrimination Act, Dormeyer could not prevail on that theory either. Disparate impact applies where the employer has imposed an eligibility requirement that is not really necessary for the job and that weighs more heavily on a protected class such as pregnant employees. Here, attendance was a legitimate job requirement from which the law did not require that pregnant women be excused. *See id.* at 583-84.

321. 209 F.3d 1008 (7th Cir.), *reh'g en banc denied* by 217 F.3d 492 (7th Cir.), and *cert. denied*, 121 S. Ct. 567 (2000).

322. *See id.* at 1016.

323. *See id.* at 1010.

324. *See id.* at 1018.

325. *Id.*



benefit absent the leave. Because the evidence in the case was close, the court remanded for a new trial.<sup>326</sup> Judge Evans, dissenting, pointed out the practical difficulties this burden allocation creates for plaintiffs, given that employers control most of the evidence needed to prove the point.<sup>327</sup>

### *B. Equal Pay Act*

Two survey period cases reiterating established doctrine deserve brief mention. In *Snider v. Belvidere Township*,<sup>328</sup> a female deputy assessor with six years of seniority received a forty-cent-per-hour raise that put her at the same hourly rate as a newly hired male deputy assessor.<sup>329</sup> Her claim of pay discrimination failed because she did not show that any similarly situated male, who was doing the same work, was paid a higher wage.<sup>330</sup>

In *Lang v. Kohl's Food Stores, Inc.*,<sup>331</sup> a group of unionized and mostly female grocery store bakery and deli employees complained that jobs in the produce department paid more, and that most produce workers were male.<sup>332</sup> Because the Equal Pay Act does not require intent to discriminate, the plaintiffs could prevail by showing unequal pay for substantially equal work.<sup>333</sup> The employer successfully argued, however, that the produce positions required more skill, responsibility, and effort. Produce workers are called upon to arrange wares for display, decide what produce to discard or mark down, and lift heavier merchandise. The plaintiff's Title VII claim failed as well for lack of evidence that the employer steered women into the lower-paying positions.<sup>334</sup>

### *C. Employee Polygraph Protection Act*

Early in the survey period, the Seventh Circuit took an expansive view of the Employee Polygraph Protection Act (EPPA),<sup>335</sup> and in *Veazey v. Communications & Cable of Chicago, Inc.*,<sup>336</sup> ruled that an audiotape recording of an employee's voice may violate the EPPA's general prohibition against lie detection tests if used in conjunction with another lie detection device. Plaintiff Veazey was the key suspect when one of his co-workers received an anonymous and threatening

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326. *See id.*

327. *See id.* at 1019 (Evans, J., dissenting); *see also* *Rice v. Sunrise Express, Inc.*, 217 F.3d 492, 493 (7th Cir. 2000) (denying petition for rehearing en banc) (Wood, J., Rovner, J. and Williams, J., dissenting with opinion).

328. 216 F.3d 616 (7th Cir. 2000).

329. *See id.* at 614, 617.

330. *See id.* at 619.

331. 217 F.3d 919 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 771 (2001).

332. *See id.* at 922.

333. *See id.* at 922-23.

334. *See id.* at 923.

335. 29 U.S.C. §§ 2001-09 (1999).

336. 194 F.3d 850 (7th Cir. 2000).



voicemail message.<sup>337</sup> As part of its investigation, the employer asked Veazey to read a copy of the threatening message into a tape recorder in order to obtain a voice exemplar. Veazey refused because he did not know how the tape might be used and because he found the message offensive. While Veazey offered to record a different message, he was nonetheless terminated for insubordination.<sup>338</sup>

After a fairly extensive review of the history of the lie detector,<sup>339</sup> the Seventh Circuit looked to the statutory definition of "lie detector," which covers any device used to render "a diagnostic opinion regarding the honesty or dishonesty of an individual."<sup>340</sup> Although simply comparing two voice samples without the aid of stress analyzing equipment is not a lie detector test, the court concluded that Veazey was entitled to try to show that the employer intended to use the recording in conjunction with some other device to directly assess whether Veazey was speaking truthfully in denying responsibility for the threatening message.<sup>341</sup>

## VII. UNEMPLOYMENT COMPENSATION

Two survey period appeals, both involving the same employer, help to illustrate when violation of a work rule is just cause for termination for unemployment compensation purposes. In *Stanrail Corp. v. Unemployment Insurance Review Board*,<sup>342</sup> the benefit claimant missed work on two consecutive days and failed to report the absences in the manner required by company policy.<sup>343</sup> The employer had a "demerit point" system that assessed points for various infractions such as safety violations (fifty points), horseplay (fifty points), and tardiness (ten points for up to six minutes, twenty points for seven to twelve minutes, etc.).<sup>344</sup> Once an employee accumulated more than 500 demerit points, he or she could be immediately dismissed from work.<sup>345</sup>

In *Stanrail Corp.*, the claimant accumulated 300 points each for his two unreported absences and was fired.<sup>346</sup> The Unemployment Insurance Review Board found that the claimant had knowingly violated a reasonable and uniformly enforced rule concerning absenteeism. It nevertheless reversed the administrative law judge's finding of just cause for the termination, by broadening its inquiry and reviewing work rules other than the rule upon which the termination was based.<sup>347</sup> The court of appeals reversed the review board on

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337. *See id.* at 853.

338. *See id.*

339. *See id.* at 854-58.

340. *Id.* at 858 (quoting 29 U.S.C. § 2001(3) (1999)).

341. *See id.*

342. 734 N.E.2d 1102 (Ind. Ct. App. 2000).

343. *See id.* at 1104.

344. *See id.* at 1103.

345. *See id.* at 1104.

346. *See id.*

347. *See id.* at 1105.



the grounds that it had impermissibly looked beyond the work rule cited as justifying the discharge.<sup>348</sup>

Stanrail was less successful in *Stanrail Corp. v. Review Board of the Department of Workforce Development*.<sup>349</sup> Stanrail changed its policy that allowed employees who submitted proper medical documentation to take unlimited unpaid sick leave in periods of three or more days at a time, to a policy allowing only three such leaves per year. Additional sick leave earned "demerit points" under the above-described system.<sup>350</sup>

The claimant took two of these unpaid sick leaves and received a written notice that he had only one remaining. He took another, and received a notice that his next such leave would earn demerit points. He then took a fourth leave to be treated for contact dermatitis and, upon his return, was assessed demerit points that resulted in his termination.<sup>351</sup>

The Indiana Court of Appeals looked to testimony of Stanrail's human resource manager, who stated that he had personal discretion whether or not to enforce the policy. He also said that an employee who was pregnant, had a heart attack or cancer, or was hospitalized for a serious illness would likely not be assessed demerit points, but that an employee ordered by a physician to remain in bed for a serious illness would probably accrue points.<sup>352</sup> The court agreed with the review board that Stanrail was not uniformly enforcing the relevant work rule, and also that the claimant did not "knowingly" violate the rule because of the rule's unwritten exceptions.<sup>353</sup> It therefore upheld the review board's ruling granting unemployment benefits to the claimant.<sup>354</sup>

One additional survey period case that clarifies notice requirements is worth noting. *Scott v. Review Board of the Indiana Department of Workforce Development*<sup>355</sup> involved an unemployment benefits claimant who was out of the state attending a funeral when her hearing notice arrived.<sup>356</sup> The notice was mailed the requisite ten days prior to the hearing, but had not yet been delivered five days later when Scott left town. When she returned, Scott found in her mail both the hearing notice and the administrative law judge's decision reversing the initial approval of benefits. The review board affirmed the decision, but the Indiana Court of Appeals reversed.<sup>357</sup>

The court interpreted the statute to require "actual, timely notice" of a hearing.<sup>358</sup> Mailing of such a notice via regular mail raises a presumption of

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348. See *id.* at 1106.

349. 735 N.E.2d 1197 (Ind. Ct. App. 2000).

350. See *id.* at 1200-01.

351. See *id.* at 1201.

352. See *id.* at 1204.

353. *Id.* at 1205.

354. See *id.* at 1206.

355. 725 N.E.2d 993 (Ind. Ct. App. 2000).

356. See *id.* at 995.

357. See *id.*

358. *Id.* at 996.



notice, but this presumption is rebuttable.<sup>359</sup> The agency did not dispute that Scott did not receive actual notice prior to the hearing, so the court concluded that Scott was denied her right to a reasonable opportunity for a fair hearing of her case's merits.<sup>360</sup>

### VIII. STATE IMMUNITY

During the last survey period, a narrow U.S. Supreme Court majority held in *Alden v. Maine*<sup>361</sup> that under the Eleventh Amendment, Congress lacked the power to subject the states to suit under the Fair Labor Standards Act (FLSA) in either federal or state courts.<sup>362</sup> Several survey period decisions followed up on this holding by addressing whether the states are subject to certain other federal employment laws. In *Kimel v. Florida Board of Regents*,<sup>363</sup> the U.S. Supreme Court held that the Age Discrimination in Employment Act (ADEA), like the FLSA, did not abrogate the states' Eleventh Amendment immunity.<sup>364</sup> Although the ADEA, unlike the FLSA, contains a clear statement of Congress' intent to abrogate state immunity, the Court held that Congress exceeded its constitutional authority under the Fourteenth Amendment in attempting to subject the states to the ADEA's provisions.<sup>365</sup>

On February 21, 2001, the Court similarly, in *University of Alabama at Birmingham Board of Trustees v. Garrett*,<sup>366</sup> held that the Eleventh Amendment bars suits in federal court by state employees to recover money damages for failure to comply with Title I of the ADA.<sup>367</sup>

The Seventh Circuit denied an Eleventh Amendment defense in *Varner v. Illinois State University*,<sup>368</sup> which involved an Equal Pay Act (EPA) claim. A class of tenured and tenure track female faculty members sued the University, claiming pay discrimination. When the Seventh Circuit originally considered the case in 1998, it held that "Congress clearly intended to abrogate the States' Eleventh Amendment immunity through its passage of the Equal Pay Act, and that this abrogation was a valid exercise of congressional authority under § 5 of the Fourteenth Amendment."<sup>369</sup> The U.S. Supreme Court, on writ of certiorari, vacated and remanded the decision for further consideration in light of *Kimel*.<sup>370</sup>

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359. *See id.*

360. *See id.*

361. 527 U.S. 706 (1999).

362. *See id.* at 712.

363. 528 U.S. 62 (2000).

364. *See id.* at 67.

365. *See id.* at 66-67.

366. 121 S. Ct. 955 (2001).

367. *See id.* at 960.

368. 226 F.3d 927 (7th Cir. 2000).

369. *Id.* at 929 (citing *Varner v. Ill. St. Univ.*, 150 F.3d 706, 717 (7th Cir. 1998), *vacated*, 120 S. Ct. 928 (2000)).

370. *See Ill. State Univ. v. Varner*, 528 U.S. 1110 (2000).



On remand, the Seventh Circuit reached the same conclusion, contrasting the EPA, which prohibits discrimination in wages based on gender, from statutes aimed at discrimination based on age and disability. The latter forms of discrimination receive only rational basis review under the Constitution, whereas gender-based classifications receive heightened scrutiny.<sup>371</sup> Because the EPA qualifies as "remedial or preventive legislation aimed at securing the protections of the Fourteenth Amendment," the Seventh Circuit again rejected the University's Eleventh Amendment defense.<sup>372</sup>

## IX. PROCEDURAL ISSUES

### A. Sufficiency of the EEOC Charge

The Seventh Circuit clarified several significant procedural questions during the survey period. One issue of critical importance to practitioners is the sufficiency of the EEOC charging document. Three cases on this topic are notable. The first is *Novitsky v. American Consulting Engineers, L.L.C.*,<sup>373</sup> in which the plaintiff complained that her employer discharged her based on age and religion, and allowed other employees to make anti-Semitic remarks in the workplace.<sup>374</sup> The plaintiff also sought damages for emotional distress because her employer failed to accommodate her religious beliefs by denying her time off on Yom Kippur. The court first observed that such damages could not be more than a day's pay because after her request was denied, the plaintiff worked on Yom Kippur.<sup>375</sup> The plaintiff's duty to mitigate damages obligated her to choose between working or not working based upon whichever caused the lesser injury, so the maximum loss would be the day's pay lost by not working.<sup>376</sup> In any event, however, the plaintiff had waived the failure-to-accommodate claim by excluding it from her charge.<sup>377</sup> Lack of notice to the employer of its alleged failure "frustrated the conciliation process" that is the purpose of the EEOC charging procedure.<sup>378</sup> The plaintiff unsuccessfully attempted to blame the EEOC, because her intake questionnaire did list the Yom Kippur episode. By statute, however, it is the charge and not the questionnaire that governs the action because the employer receives only the charge.<sup>379</sup> The plaintiff freely signed the

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371. See *Varner*, 226 F.3d at 934.

372. *Id.* at 936 (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 627, 639 (1999)).

373. 196 F.3d 699 (7th Cir. 1999).

374. See *id.* at 701.

375. See *id.*

376. See *id.* The court acknowledged that the calculation would be more complicated if the plaintiff offered any evidence that refusal to work could have jeopardized her job. See *id.*

377. See *id.* at 703.

378. *Id.* at 702.

379. See *id.* (citing 42 U.S.C. § 2000e-5(b)).



charge, and therefore was bound whether she read it or not.<sup>380</sup>

A similar issue arose in *Vela v. Village of Sauk Village*.<sup>381</sup> Plaintiff Vela circled "harassment" as a type of discrimination alleged on her intake form, but this item was subsequently crossed out on the form.<sup>382</sup> On her actual charge form, Vela checked "sex" and "national origin" as bases of discrimination and listed three specific incidents in which she claimed she was treated differently from non-Mexican male employees. The district court granted the employer's summary judgment motion, in part because of Vela's failure to include a sexual harassment claim in her EEOC charge.<sup>383</sup>

Vela unsuccessfully argued on appeal that because sexual harassment is a form of sexual discrimination, her charge was sufficient because she checked "sex" as one basis of discrimination against her. The Seventh Circuit disagreed, citing precedent that there must be "a reasonable relationship between the allegations in the charge and the claims in the complaint," and that it must appear that "the claim in the complaint can reasonably be expected to grow out of an EEOC investigation of the allegations in the charge."<sup>384</sup>

Vela also argued that she had orally communicated the facts related to her sexual harassment claim to an agency intake officer, who misled her when he told her to cross out the sexual harassment reference on the intake form and who omitted the claim of harassment when he typed the charge. The Seventh Circuit remained unpersuaded, citing *Novitsky* and stating that "an oral charge, if made as [Vela] testified, not reflected in nor reasonably related to the charge actually filed, is not a sufficient predicate for a claim of sexual harassment in her civil action."<sup>385</sup> These two cases make clear that an oral statement to an EEOC representative is no substitute for written documentation in the formal charge of all types of discrimination alleged.

The final case covering sufficiency of the EEOC charging document is *Scott v. City of Chicago*.<sup>386</sup> The plaintiff charged the employer with taking actions to "lessen [her] job responsibilities" based on race and age.<sup>387</sup> The city sought

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380. See *id.* Judge Rovner, concurring, focused on the fact that here, the plaintiff's counsel was present when the plaintiff reviewed and signed the charge that the EEOC drafted. See *id.* at 703 (Rovner, J., concurring). The panel majority opinion noted that the charge did not offer the employer adequate notice "whether or not the complainant had a lawyer, whether or not she sought or listened to counsel, indeed, whether or not she read or understood the charge." *Id.* at 702-03. Judge Rovner wrote that "[c]ontrary to the opinion's implications, we do not now decide whether an illiterate person or *pro se* person who signs a charge prepared by the EEOC, which leaves out critical information provided by the claimant to the EEOC in the intake questionnaire, would be similarly bound by the charge." *Id.* at 703 (Rovner, J., concurring).

381. 218 F.3d 661 (7th Cir. 2000).

382. See *id.* at 663.

383. See *id.*

384. *Id.* at 664 (quoting *Cheek v. W. & S. Life Ins. Co.*, 31 F.3d 497, 500 (7th Cir. 1994)).

385. *Id.* at 665.

386. 195 F.3d 950 (7th Cir. 1999).

387. *Id.* at 951.



dismissal, citing several cases in which the complaint failed to include notice of an item that was essential to the plaintiff's claim.<sup>388</sup> The Seventh Circuit held on appeal that the district court wrongly granted the employer's motion to dismiss. The reason for the dismissal was that the complainant failed to specify what adverse employment actions the employer took against her.<sup>389</sup> However, the Seventh Circuit focused on the fact that the plaintiff held a distinctive job position, as Assistant Commissioner of Systemwide Services at the City of Chicago Public Library. In light of her unique job responsibilities, the court held that the complaint adequately communicated the gravamen of her claims.<sup>390</sup>

### *B. Title VII Class Notice Requirements*

Another important procedural issue involves Title VII class certification. In *Jefferson v. Ingersoll International Inc.*,<sup>391</sup> the plaintiffs as a class filed a pattern-or-practice suit asserting that the defendant employers committed race discrimination in considering employment applications. They sought both equitable relief and monetary damages.<sup>392</sup> Prior to the Civil Rights Act of 1991, the normal basis of class certification in pattern-or-practice cases was Federal Rule of Civil Procedure 23(b)(2), because only equitable relief was available.<sup>393</sup> This rule, unlike Rule 23(b)(3), which applies when the plaintiffs seek money damages, does not require notice to each class member, and does not allow class members to opt out of the action.<sup>394</sup> The district judge in *Jefferson* ruled that the plaintiffs could proceed under Rule 23(b)(2), and the defendants brought an interlocutory appeal.<sup>395</sup>

The Seventh Circuit held that when a plaintiff class seeks compensatory or punitive damages, Rule 23(b)(2) applies only if the monetary relief sought "is incidental to the equitable remedy."<sup>396</sup> The court remanded the case for resolution of whether the damages sought were more than incidental.<sup>397</sup> If so, the

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388. See *id.* at 952 (citing *Kyle v. Morton High Sch.*, 144 F.3d 448, 454 (7th Cir. 1998); see also *Panaras v. Liquid Carbonic Indus. Corp.*, 74 F.3d 786, 792 (7th Cir. 1996); *Perkins v. Silverstein*, 939 F.2d 463, 467-68 (7th Cir. 1991)).

389. See *id.* at 951.

390. See *id.* at 952.

391. 195 F.3d 894 (7th Cir. 1999).

392. See *id.* at 896.

393. See *id.* Before the Civil Rights Act of 1991 became effective, class members could receive a monetary award for back pay, but the back pay was deemed equitable relief. See *id.*

394. See *id.*

395. See *id.* at 897.

396. *Id.* at 898. The court noted the U.S. Supreme Court's holding in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), that "proper interpretation of Rule 23, principles of sound judicial management, and constitutional considerations (due process and jury trial), all lead to the conclusion that in actions for money damages class members are entitled to personal notice and an opportunity to opt out." *Jefferson*, 195 F.3d at 897.

397. See *id.* at 899.



court directed, the district court could either certify the class under Rule 23(b)(3) for all purposes, or it could bifurcate the proceedings by certifying a class under Rule 23(b)(3) for money damages and under Rule 23(b)(2) for equitable relief.<sup>398</sup>

Later during the survey period, the Seventh Circuit reaffirmed both this holding and the acceptable alternative approaches in *Lemon v. International Union of Operating Engineers*.<sup>399</sup> In *Lemon*, the court observed that the more abbreviated procedure of Rule 23(b)(2) is based on the presumption that the class members have "cohesive and homogeneous" interests in redressing a common injury by an injunctive or declaratory remedy.<sup>400</sup> In contrast, monetary damage claims typically "require judicial inquiry into the particularized merits of each individual plaintiff's claim."<sup>401</sup>

### C. Other Developments

Another noteworthy Seventh Circuit case in the procedural arena is *Pohl v. United Airlines, Inc.*<sup>402</sup> In *Pohl*, an aircraft inspector sued his employer for discrimination based on military status. His attorney discussed the case with opposing counsel and the attorneys for both sides informed the court that they had agreed to a settlement. The plaintiff then refused to sign the settlement agreement, claiming that his attorney had not been authorized to settle. District Judge Barker entered an order enforcing the agreement on the grounds that the attorney had actual authority to settle, and the Seventh Circuit affirmed, applying Indiana law.<sup>403</sup>

Pohl had participated in a series of telephone conversations with his attorney during settlement negotiations, which correlated with his attorney's calls to opposing counsel. Pohl did not object when he received his attorney's letter informing him that his case had been settled. The attorney testified to having communicated each aspect of the settlement to Pohl. Pohl pointed to his handwritten caveat "with my authorization," which he had added to the section of his retainer agreement granting a power of attorney to execute all documents, including settlement agreements. The court, however, refused to interpret this addendum as requiring written authorization, referring to the plaintiff's "misplaced belief that he could back out of the settlement at any time prior to signing it."<sup>404</sup> In light of the court's stance, diligent attorneys will make clear to their clients that a litigant may be bound by a settlement agreement if he

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398. *See id.* The Seventh Circuit also addressed the contention that the EEOC's intervention on the plaintiffs' behalf rendered the class certification issue moot. The court rejected this argument because the EEOC might not seek or receive the same relief that the plaintiffs were seeking in their class suit. *See id.*

399. 216 F.3d 577 (7th Cir. 2000).

400. *Id.* at 580.

401. *Id.*

402. 213 F.3d 336 (7th Cir. 2000).

403. *See id.* at 337-38, 340.

404. *Id.* at 340.



acquiesces in his attorney's representations during negotiations, even prior to formally signing any settlement documentation.

Moving on to administrative developments, the National Labor Relation Board (NLRB) made news by ruling that nonunion workers must be allowed to bring a witness to any workplace meeting that might lead to disciplinary action.<sup>405</sup> The NLRB had extended these "*Weingarten* rights"<sup>406</sup> to nonunion employees in 1982, but reversed its position in 1985.<sup>407</sup> The most recent, three-to-two decision restores those rights retroactively, and may help plaintiffs survive summary judgment by allowing a witness to verify their version of events.<sup>408</sup>

The NLRB majority looked to section 7 of the National Labor Relations Act, which protects the right of employees to engage in "concerted activities for the purpose of mutual aid or protection."<sup>409</sup> Extending *Weingarten* rights, it held, would further this purpose by discouraging unjust punishment of employees.<sup>410</sup>

The two dissenting NLRB members raised a number of concerns, in addition to the uncertainty that such departures from precedent create.<sup>411</sup> One was that a nonunion employee-witness might well lack the knowledge and experience of a union-trained observer and would not represent the interests of all unit employees.<sup>412</sup> Another was the likelihood of increased litigation due to a lack of employer awareness, which would lead to frequent violations.<sup>413</sup> Finally, the presence of an employee-witness could impair the effectiveness of the interview from the employer's perspective, particularly if the assistant is someone personally involved in the matter under investigation.<sup>414</sup>

In addition to raising these concerns, the NLRB's opinion leaves a number of questions unanswered. One is whether employers must pay employee-witnesses or grant them time off to attend investigatory interviews.<sup>415</sup> The NLRB also did not address whether employers must give employees advance warning that a meeting might lead to discipline, nor did it define exactly what type of meetings are covered, such as negative performance appraisals. There is also some debate whether employers are obligated to follow a policy of notifying nonunion employees of their *Weingarten* rights.<sup>416</sup>

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405. See *Epilepsy Found. of Northeast Ohio*, 331 NLRB No. 92 (2000), 2000 WL 967066 (NLRB).

406. See *NLRB v. Weingarten*, 420 U.S. 251 (1975).

407. See *Epilepsy Found.*, 331 NLRB No. 92, 2000 WL 967066, at 3.

408. See *id.* at 4.

409. See *id.*

410. See *id.*

411. See *id.* at 12.

412. See *id.* at 13, 29.

413. See *id.* at 14 ("The workplace has become a garden of litigation and the Board is adding another cause of action to flower therein, but hiding in the weeds.").

414. *Id.* at 43, 100.

415. See Susan J. McGolrick, *Employee Rights: Attorneys Disagree About Wisdom of NLRB Extending Weingarten Rights*, DAILY LAB. REP., Aug. 7, 2000.

416. See *id.*



This ruling helps level the playing field for employees who are unfairly disciplined or discharged and should encourage plaintiffs' attorneys. The ruling, however, requires close monitoring. An appeal seems likely, and the fact that the NLRB members split their votes along party lines (with the three Democrats in the majority and the two Republicans dissenting<sup>417</sup>) makes it possible that a change in the NLRB's composition could lead to yet another reversal.

## X. THE "WATCH LIST"

### A. *The Enforceability of Arbitration Agreements*

One hot topic in employment law is how far employers can go in requiring employees to agree to binding arbitration. In an effort to control legal costs, employers have increasingly turned to this kind of agreement, and until recently the enforceability of such agreements seemed fairly clearcut.<sup>418</sup> The Seventh Circuit, along with most other circuits, had taken the position that the Act authorizes federal courts to enforce binding arbitration provisions in all employment contracts.<sup>419</sup> But then the Ninth Circuit took a contrary position that caused great consternation among employers, and the U.S. Supreme Court stepped in to resolve the circuit split.

On March 21, 2001 employers applauded the U.S. Supreme Court's decision in *Circuit City Stores, Inc. v. Adams*,<sup>420</sup> which left the Seventh Circuit precedent undisturbed. Plaintiff Adams signed a form as part of his application when Circuit City hired him in 1995, agreeing to submit all employment disputes to binding arbitration.<sup>421</sup> Two years later, Adams brought suit in state court alleging harassment based on sexual orientation under California law.<sup>422</sup> The Ninth Circuit interpreted language in the Federal Arbitration Act exempting "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" as excluding all employment contracts from the Act's coverage.<sup>423</sup> It reversed the federal district court's order compelling arbitration.<sup>424</sup>

The U.S. Supreme Court reversed the Ninth Circuit in a 5-4 decision based upon the text of the statute, rather than its legislative history.<sup>425</sup> The majority

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417. *See id.*

418. The Federal Arbitration Act, 9 U.S.C. § 1 (2000), makes predispute arbitration valid and enforceable. *See Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 364 (7th Cir.), *cert. denied*, 528 U.S. 811 (1999).

419. *See Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir. 1999).

420. No. 99-1379, 2001 U.S. LEXIS 2459 (Mar. 21, 2001).

421. *See id.* at \*8-9.

422. *Id.* at \*9; Marcia Coyle, *Three High Court Rulings Give Business Upper Hand in ADRs*, NAT'L. L.J., Apr. 2, 2001 at B1.

423. *Circuit City*, 2001 U.S. LEXIS 2459 at \*7-8.

424. *See Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999).

425. *See Circuit City*, 2001 U.S. LEXIS 2459 at \*7, \*25-26, \*33.



interpreted the Act's exemption narrowly as excluding only transportation worker employment contracts from the Act's coverage.<sup>426</sup> Justice Anthony M. Kennedy, writing for the majority, noted "Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation."<sup>427</sup> The Court was not persuaded by the attorneys general of twenty-two states, who argued as *amici* that the Federal Arbitration Act should not be read to pre-empt state laws that protected employees by prohibiting them from signing away their rights to pursue state-law discrimination actions in court.<sup>428</sup>

While the decision clarified the overall scope of the Federal Arbitration Act, it left many questions unanswered. The Court reiterated a prior holding that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."<sup>429</sup> It remains to be seen whether workers who agree to arbitration retain their rights to collect punitive damages and attorney fees, and to pursue class actions. Another unresolved question is how broadly "transportation workers" will be defined.

The role of agencies such as the EEOC in cases involving arbitration agreements is another open issue. The Court has granted certiorari in its first case dealing with this question. Next term, it will take up the case of *E.E.O.C. v. Waffle House, Inc.*,<sup>430</sup> in which the EEOC is arguing that it should not be precluded from seeking relief such as back pay, damages or reinstatement on behalf of workers who signed arbitration agreements because it was not a party to the agreement.<sup>431</sup> Employment law attorneys should watch for this decision and others clarifying the power of employment arbitration agreements.

### *B. Electronic Monitoring of Employee Activities*

A second area worth watching falls under the general heading of workplace privacy. During the summer of 2000, sponsors introduced the Notice of Electronic Monitoring Act in both the U.S. Senate and the House of Representatives.<sup>432</sup> The proposed bill would prohibit secret surveillance of employee communications, by requiring employers notify employees before monitoring telephones, e-mail or Internet use and/or tracking computer keystrokes. The proposed notice requirement includes the frequency of employer monitoring activities.

Although the bill stalled in the committee process, workplace privacy issues

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426. *See id.* at \*25.

427. *Id.* at \*32.

428. *See id.* at \*29-30.

429. *Id.* at \*33 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

430. 193 F.3d 805 (4th Cir. 1999), *cert. granted*, 69 U.S.L.W. 3628 (U.S. Mar. 26, 2001) (No. 99-1823).

431. *See id.* at 806-07.

432. *See* H.R. 4908, 106th Cong. (2d Sess. 2000); *see also* S. 2898, 106th Cong. (2000).



continue to receive significant press. Evolving technology that offers employer ever cheaper and more comprehensive monitoring tools may increase employers' monitoring practices.<sup>433</sup> Those interested should watch for further legislative activity.

*C. Carpal Tunnel Syndrome as a Disability; Job Transfer  
Rights of the Disabled*

On April 16, 2001, the U.S. Supreme Court granted certiorari in two ADA cases for the 2001 term.<sup>434</sup> In the first, *Williams v. Toyota Motor Manufacturing, Ky., Inc.*,<sup>435</sup> the Sixth Circuit held that a woman with carpal tunnel syndrome qualified for protection under the ADA because she was substantially limited in performing manual tasks.<sup>436</sup> Toyota argues that the plaintiff can do other work and engage in a many everyday activities, which makes her only partially impaired and ineligible for ADA protection.<sup>437</sup> It is asking the Court to interpret the ADA to require an impairment that significantly restricts, and does not merely affect, a major life activity.<sup>438</sup>

The second case, *Barnett v. U.S. Air*,<sup>439</sup> involves a disabled employee's right to reassignment into a position that she could not otherwise claim due to a unilaterally imposed seniority system.<sup>440</sup> The Ninth Circuit looked for guidance to the EEOC's compliance manual, which says, "Reassignment means that the employment gets the vacant position if s/he is qualified for it. Otherwise, reassignment would be of little value and would not be implemented as Congress intended."<sup>441</sup> It held that "reassignment is a reasonable accommodation and . . . a seniority system is not a per se bar to reassignment," although "a seniority system is a factor in the undue hardship analysis" that is conducted on a case-by-case basis.<sup>442</sup>

Employment law attorneys who work with disability claims will look forward with interest to the U.S. Supreme Court's take on these issues.

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433. See Greg Miller, *High-Tech Snooping All in Day's Work; Security: Some Firms Are Now Using Computer Investigators to Uncover Employee Wrongdoing*, L.A. TIMES, Oct. 29, 2000, at A1; see also Joe Salkowski, *Rising Workplace Hazard: Snooping*, CHI. TRIB., July 31, 2000, at C5.

434. See Linda Greenhouse, *Justices Accept 2 Cases to Clarify Protection for Disabled*, N.Y. TIMES, April 17, 2001 at A13.

435. 224 F.3d 840 (6th Cir. 2000).

436. See *id.* at 843.

437. See Greenhouse, *supra* note 434.

438. See *id.*

439. 228 F.3d 1105 (9th Cir. 2000).

440. See *id.* at 1118.

441. *Id.* (quoting EEOC ENFORCEMENT GUIDANCE, EEOC COMPLIANCE MANUAL 5452).

442. *Id.* at 1120.



### CONCLUSION

The survey period developments covered the entire employment spectrum. Many issues remain evolutionary, and the volume and variety of these developments may frustrate practitioners who are struggling to keep current.

On a more positive note, it is this diversity of claim types, issues, and factual scenarios that makes employment law such a vital area of practice. The ever-shifting landscape creates potential pitfalls for the uninformed, but it assures that employment attorneys will remain challenged.







# RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW

JEFF PAPA\*

Although the Indiana Rules of Evidence (Rules) became effective more than seven years ago, many aspects of those rules remain open to interpretation. Debate over the proper rule of evidence in a particular situation stems not only from interpreting the text of the Rules, but also from determining the proper influence of statutory and common law.

This Article explains many of the developments in Indiana evidence law during the period between October 1, 1999 and September 30, 2000. The discussion topics are grouped in the same subject order as the Indiana Rules of Evidence, followed by a few evidence topics not explicitly covered by the Rules.

## I. SCOPE OF THE RULES

According to Rule 101(a), the Rules apply to all Indiana court proceedings except where "otherwise required by the Constitution of the United States or Indiana, by the provisions of this rule, or by other rules promulgated by the Indiana Supreme Court."<sup>1</sup> In situations where the rules do not "cover a specific evidence issue, common or statutory law shall apply."<sup>2</sup> This leaves the applicability of the Rules open to debate.

The wording of Rule 101(a), requiring the application of statutory or common law in areas not covered by the rules, has been interpreted by the Indiana Supreme Court to mean that the rules trump any conflicting statute.<sup>3</sup>

## II. RELEVANCE

### A. Admission of Photographic Evidence

In *Cutter v. State*,<sup>4</sup> the appellant was convicted of murder, felony murder, criminal confinement and rape. Cutter argued on appeal that the trial court had erred by admitting an inflammatory photograph of the victim into evidence. The photograph in question was of the pathologist holding open the victim's vagina and was used to show the jury bruising of the victim's vagina. Cutter contended that he was prejudiced by introduction of the photograph and that it was irrelevant to any issue properly before the jury.<sup>5</sup>

Although the photograph was admitted into evidence without objection,<sup>6</sup> the

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1. IND. R. EVID. 101(a).

2. *Id.*

3. See *Williams v. State*, 681 N.E.2d 195, 200 n.6 (Ind. 1997); *Humbert v. Smith*, 664 N.E.2d 356, 357 (Ind. 1996).

4. 725 N.E.2d 401 (Ind. 2000).

5. See *id.* at 404-06.

6. The court noted that such failure to object usually results in "waiver and precludes



court reviewed the admission of the photograph for abuse of discretion.<sup>7</sup> Under Rule 403, “[a]lthough a photograph may arouse the passions of the jurors, it is admissible unless ‘its probative value is substantially outweighed by the danger of unfair prejudice.’”<sup>8</sup>

The court decided that the photograph contained probative value for several purposes. The photograph was useful to show bruises that were relevant to the “by force” element of the rape charge; the photograph was relevant to the State’s contention that the rape was of unusual force and accompanied by penetration of a fist-like object; and the photograph was relevant to the lay testimony of one of the State’s witnesses.<sup>9</sup> While the court restated the rule that “autopsy photographs in which a pathologist distorts a victim’s body parts are ordinarily objectionable,” the distortion in this case was necessary due to the internal nature of the injuries in question.<sup>10</sup>

### *B. Improper Admission of Character Evidence*

In *Buchanan v. State*,<sup>11</sup> the appellant had been convicted for taking nude photographs of and having sex with a five-year-old child. On appeal, Buchanan raised several challenges, including a claim that the trial court abused its discretion by allowing into evidence pornographic photographs, drawings and magazines found in Buchanan’s possession.<sup>12</sup>

Buchanan argued that admission of this evidence was erroneous “because its potential prejudicial effect on the jury outweighed any probative value and because the State improperly used the evidence to prove [his] character.”<sup>13</sup> Rule 404(b) states that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”<sup>14</sup> Additionally, the evidence must be relevant to a matter at issue other than the defendant’s propensity to commit the crime. Even if found relevant, “the evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.”<sup>15</sup>

The pornographic material seized at Buchanan’s home contained

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appellate review unless its admission constitutes fundamental error.” *Id.* at 406 (citing *Willey v. State*, 712 N.E.2d 434, 444-45 (Ind. 1999)).

7. *See id.*

8. *Id.* (quoting IND. EVIDENCE RULE 403).

9. *See id.*

10. *Id.* (citing *Allen v. State*, 686 N.E.2d 760, 776 (Ind. 1997), *cert. denied*, 525 U.S. 1073 (1999)).

11. 742 N.E.2d 1018 (Ind. Ct. App. 2001).

12. *See id.* at 1020-21.

13. *Id.* at 1021.

14. IND. R. EVID. 404(b).

15. IND. R. EVID. 403.



“photographs of semi-nude children, drawings of nude children and the cover of a magazine entitled ‘Little Girls,’ which appear[ed] to depict an adult male engaging in intercourse with a child.”<sup>16</sup> The State argued that this material was admissible to demonstrate Buchanan’s plan and motive to molest the victim in this case.<sup>17</sup>

The court described the “plan exclusion” of Rule 404(b) as a test of “not whether the other offenses have certain elements in common with the charged crime, but whether the other offenses tend to establish a preconceived plan.”<sup>18</sup> In other words, the crime must be “so related in character, time, and place of commission as to establish some plan which embraced both the prior and subsequent criminal activity and the charged crime.”<sup>19</sup>

While the court found the seized evidence distasteful, it stated that possession of these items did not demonstrate that Buchanan had a plan to molest little girls. The court decided that because the evidence was not relevant to the existence of a plan, its admission was error. The court also decided that the photographs and drawings were not relevant evidence of a motive because they were not tied in any way to Buchanan’s relationship with the victim.<sup>20</sup>

A second case addressing Rule 404(b) issues, *Pope v. State*,<sup>21</sup> involved a conviction for child exploitation and possession of child pornography stemming from electronic communications over the Internet. Pope was accused of assuming the screen name “Mnight”, entering an Internet chat room, and sending child pornography to an undercover Cook County, Illinois, Sheriff Department officer. The officer had been posing as a thirteen year old girl (alias Nikki 13) on the Internet. Mnight electronically sent pornographic pictures of young girls to Nikki 13 and suggested they meet for sex.<sup>22</sup>

After arrangements for a meeting at an Illinois Holiday Inn were made, Pope arrived at the hotel, went to the arranged room and was detained by authorities. A search of Pope’s home computer found approximately twenty-six photographs of children having sex or in explicit positions. On appeal, Pope argued that the evidence of the Holiday Inn meeting and his communications over the Internet were inadmissible evidence of other bad acts.<sup>23</sup>

While Rule 404(b) excludes evidence introduced to prove the “forbidden inference” of a defendant’s propensity to commit the crime in question, evidence of uncharged misconduct that is “inextricably bound up” with the offense in

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16. *Buchanan*, 742 N.E.2d at 1022.

17. *See id.*

18. *Id.*

19. *Id.* at 1022 (citing *Lannan v. State*, 600 N.E.2d 1334, 1339 (Ind. 1992)).

20. *See id.* The court added that even if this evidence had demonstrated a common plan or motive, they would not pass the second (balancing) part of the 404(B) test. The court noted that the sheer volume of the pornographic material would be highly prejudicial, while the probative value would be minimal. *See id.* at 1022-23.

21. 740 N.E.2d 1247 (Ind. Ct. App. 2000).

22. *See id.* at 1249.

23. *See id.* at 1250.



question is admissible under Rule 404.<sup>24</sup> Pope's defense at trial was that someone else had sent the photographs without his knowledge. The court found that the testimony at trial describing the hotel meeting demonstrated that Pope's motive for sending the photographs was to entice Nikki 13 to have sex with him. The court also found that his actions at the Hotel were relevant to rebut his contention that he had never sent the photographs or met Nikki 13 on the Internet. Pope also argued that the evidence was highly prejudicial. However, the court found that it was highly probative in demonstrating that he was Mnight, the computer user who had sent the photographs and communicated with Nikki 13. Therefore, the court declined to find that the danger of unfair prejudice outweighed the probative value of the evidence.<sup>25</sup>

### III. IMPEACHMENT

#### *A. Evidence of Prior Crimes for Witness Impeachment*

Rule 609(a) allows a party to use evidence that a witness has been convicted of certain crimes or attempts to commit certain crimes in order to attack the witness' credibility.<sup>26</sup> Since the adoption of the Rules, however, the Indiana Supreme Court had not considered whether a guilty plea not yet reduced to judgment could be counted as such a conviction.

Among the crimes enumerated in Rule 609(a) is that of criminal confinement.<sup>27</sup> In *Specht v. State*,<sup>28</sup> the appellant had been convicted of participating in a hold-up at a trial in which his earlier guilty plea to a confinement charge was used to impeach him even though that plea had not been reduced to judgment due to a deferred prosecution agreement. Specht argued that a guilty plea was not a "conviction" under Rule 609(a) because it had not been reduced to judgment.<sup>29</sup>

The supreme court noted that prior to the adoption of the Rules in 1994, such evidence could be used for impeachment purposes.<sup>30</sup> The court further noted that existing case law stated that "when there has been a plea of guilty it is a conviction of crime and the presumption of innocence no longer follows the defendant . . . . The fact that final judgment was not rendered does not alter the fact that he stands convicted of the crime to which he has entered a plea."<sup>31</sup> The court found that while the Rules superceded existing common law, Rule 609(a) preserved, rather than replaced, the case law regarding impeachment. The court noted that the committee responsible for drafting the Rules explicitly remarked

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24. *Id.* (citing *Sanders v. State*, 724 N.E.2d 1127, 1130-31 (Ind. Ct. App. 2000)).

25. *See id.* at 1251.

26. *See* IND. R. EVID. 609(a).

27. *See id.*

28. 734 N.E.2d 239 (Ind. 2000).

29. *See id.* at 240.

30. *See id.*

31. *Id.* (quoting *McDaniel v. State*, 375 N.E.2d 228, 230 (Ind. 1978)).



that “this section preserves prior Indiana Law.”<sup>32</sup> Therefore, the court found that the existing common law rule that allows the use of a guilty plea not yet reduced to judgment to attack witness credibility survived the adoption of the Rules.<sup>33</sup>

### *B. Financial Interest Witness Bias*

Rule 616 states that “[f]or the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible.”<sup>34</sup> In *Tucker v. State*,<sup>35</sup> Tucker challenged his conviction based on the fact that the trial court had granted a motion *in limine* forbidding Tucker from questioning a witness about whether the witness had reported the payment for his confidential informant activities on his taxes. The court of appeals held that this limitation did not substantially impair Tucker’s ability to show bias because evidence of the informant’s ties to police was presented at trial. The court reasoned that while failure to pay taxes might weigh on the informants’ credibility as a witness, sufficient evidence was presented to allow the jury to infer bias from the informant’s police ties. In the court’s view, possible non-payment of taxes on the informant fee has little impact on how a witness will testify. Therefore, Tucker’s conviction was affirmed.<sup>36</sup>

A similar case, *McCarthy v. State*,<sup>37</sup> involved a person convicted of two counts of sexual misconduct with a minor. On appeal, McCarthy argued that it was reversible error for the trial court to deny him the right to question the mother of one of the alleged victims who was a witness at trial about a notice of tort claim she had filed against the appellant’s school-corporation employer. McCarthy argued that he should have been able to question the witness regarding bias in the form of a financial interest stemming from the tort claim. Because the jury was only “allowed to hear from the potentially sympathetic mother of an alleged victim, not the potential recipient of a financial settlement or award,”<sup>38</sup> the court of appeals agreed that the jury was unable to fairly judge the witness’s credibility and granted McCarthy a new trial.<sup>39</sup> However, the Indiana Supreme Court vacated this decision by granting transfer, leaving this particular issue unsettled.<sup>40</sup>

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32. *Id.* (quoting INDIANA SUPREME COURT COMMITTEE ON THE ADOPTION OF THE INDIANA RULES OF EVIDENCE, PROPOSED INDIANA RULES OF EVIDENCE [AND COMMENTARY] 40 (1993)).

33. *See id.* at 240-41.

34. IND. R. EVID. 616. The right of confrontation of witnesses against a party is also granted under the Sixth Amendment. *See* U.S. CONST. amend. VI.

35. 728 N.E.2d 261 (Ind. Ct. App. 2000).

36. *See id.* at 262-63.

37. 726 N.E.2d 789 (Ind. Ct. App.), *vacated by* 735 N.E.2d 236 (Ind. 2000).

38. *Id.* at 793.

39. *See id.*

40. *See McCarthy*, 735 N.E.2d at 236.



### C. Inquiry into Validity of a Verdict

Rule 606(b) states that “[u]pon an inquiry into the validity of a verdict . . . a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations.”<sup>41</sup> However, the Rule includes exceptions for testimony regarding drug or alcohol use by any juror, whether or not extraneous prejudicial information was brought to the attention of the jury, and whether any outside influence was improperly brought upon any juror.<sup>42</sup> *Griffin v State*<sup>43</sup> is the first case to address the specific exceptions contained in Rule 606(b).

At Griffin’s trial, the final jury instructions included an instruction that an alternate juror would be allowed into the jury room in case the need for a replacement juror should arise, but that the alternate would not participate in any way during the deliberations. After his conviction, Griffin filed a motion to correct errors alleging that the alternate juror improperly influenced the jury.<sup>44</sup>

Griffin’s theory was that the conduct of an alternate juror can amount to an improper outside influence on the jury as contemplated by Rule 606(b). The court of appeals disagreed, noting that a presumption exists that the alternate juror followed the instruction not to participate and that the jury members properly ignored any such interference. The court further noted that because juror affidavits are inadmissible, there could be no evidence of the alternate juror’s conduct with which to impeach the verdict. Therefore, the court declined to overrule the trial court’s denial of the motion to correct errors.<sup>45</sup> The court of appeals’ decision, however, was vacated by the Indiana Supreme Court on January 17, 2001.

### D. Prior Inconsistent Statements Used to Impeach on Collateral Matters

Rule 613(b) states that “[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.”<sup>46</sup> In *Jackson v. State*,<sup>47</sup> the appellant had been convicted of the shooting death of his wife. The police deputy, who was the first to arrive at the scene of the death, testified at trial that he did not recall telling the defendant’s sister that he thought the shooting was an accident.<sup>48</sup>

Jackson argued on appeal that the trial court erred in refusing to allow

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41. IND. R. EVID. 606(b).

42. *See id.*

43. 735 N.E.2d 258 (Ind. Ct. App. 2000), *vacated by* No. 49S02-0101-CR-43, 2001 Ind. LEXIS 53, at \*1 (Ind. Jan. 17, 2001).

44. *See id.* at 262-63.

45. *See id.* at 263-64 (citations omitted).

46. IND. R. EVID. 613(b).

47. 728 N.E.2d 147 (Ind. 2000).

48. *See id.* at 150, 152.



defense counsel to call the sister to testify for the purpose of impeaching the deputy's testimony with a prior inconsistent statement. The Indiana Supreme Court agreed with the State's contention that "whether or not [the deputy] had ever expressed the belief that the killing was accidental was a collateral matter."<sup>49</sup> The court held that, while impeachment on collateral matters had not been addressed since the adoption of the Rules, it saw no reason to "depart from the well established common law rule that this is barred."<sup>50</sup>

The court explained that the only inconsistency at issue was whether or not the deputy made the statement to the defendant's sister. The deputy could not testify as to his belief that the shooting was accidental or to the underlying fact that the shooting was accidental. Therefore, whether or not the deputy made this comment to the sister was collateral as well as irrelevant. Any testimony that the shooting was accidental would also be inadmissible because it would be an expression of intent barred by Rule 704(b).<sup>51</sup>

### *E. Interrogation by Juror*

Rule 614(d) allows jurors to propound questions to a witness by submitting them to the judge, who decides whether to submit the questions to the witness, subject to objections by the parties outside the presence of the jury.<sup>52</sup> In *Vinson v. State*,<sup>53</sup> a juror propounded a question after the State had rested its case. The trial court, over the defense's objections, reopened the case to address the juror's question. The juror's question concerning the whereabouts of a second possible culprit implied the juror had doubts over who was the actual perpetrator.<sup>54</sup> Defense counsel objected, stating that reopening the case for this purpose would "shift the burden and aide the prosecution in clearing up the reasonable doubt in the juror's minds."<sup>55</sup> The trial court overruled the objection and allowed the State to ask numerous questions of the witness concerning the other possible suspect. The Indiana Court of Appeals held that this was a proper use of Rule 614(d).<sup>56</sup>

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49. *Id.* at 153.

50. *Id.* (citing 13 ROBERT LOWELL MILLER, JR., INDIANA PRACTICE § 613.209 (2d ed. 1995)).

51. *See id.* "Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions." IND. R. EVID. 704(b).

52. *See* IND. R. EVID. 614(d).

53. 735 N.E.2d 828 (Ind. Ct. App.), *trans. denied*, 741 N.E.2d 1260 (Ind. 2000).

54. *See id.* at 836.

55. *Id.*

56. *Id.* The defense also asked that reopening the case be limited to a single question, but the request was overruled by the trial court. The trial court stated that the issue was more complex than the simple location of the other possible perpetrator. The defense was allowed to cross-examine the witness on the new direct examination questions. *See id.*



In *Trotter v. State*,<sup>57</sup> the appellant had been convicted of theft and attempted fraud for trying to purchase items with a stolen credit card. At trial, the evidence against Trotter included the attempted credit transaction receipt, as well as a surveillance video of the attempted transaction. Following the admission of the evidence, a juror submitted a written question to the court, asking the security guard if the time of day indicators on the video and the sales receipt were identical.<sup>58</sup>

The trial judge discussed the issue with the parties out of the jury's presence. Defense counsel argued that the document spoke for itself, that the security guard was not a proper witness for this question, and that it went beyond the scope of the State's questioning. The objections were overruled by the court, and the guard was asked if he was familiar with timestamping. The parties were then allowed to question the guard on matters related to the juror's question. The guard testified that the times did not match on their faces because an electrical storm had reset the video system, but correcting for the reset, the times did match. Defense counsel then asked the court for a continuance to verify the testimony about the storm, but the request was denied.<sup>59</sup>

Trotter asserted on appeal that the question was not proper because it went beyond the evidence that the State had chosen to present. The court of appeals found no error, stating that the question was a proper one because it led to discovery of the truth. Trotter also argued that the question benefitted the State because it allowed the State to explain a discrepancy in the evidence against him. However, the court found no error, pointing out that in most cases where an answer to a question clarifies an issue, one of the parties will indeed benefit. The court further noted that to hold otherwise would infringe on the jury's fact-finding mission. The court clarified its statement, adding that not every juror question leading to the discovery of the truth must be allowed. According to the court, any such question must also meet the admissibility requirements of the Rules of Evidence.<sup>60</sup>

Trotter further argued that the trial judge improperly encroached on the prosecutor's duties and assumed an adversarial role by asking the witness a foundational question to determine the witness' qualifications to answer the juror's question. While the court found Rule 614(d) to be silent on this issue and found no previous cases discussing the appropriateness of judge questioning to decide whether to submit a juror question, it found no error. In support of this finding, the court noted that existing case law permits the trial court to ask questions where the answer is needed to rule intelligently on a matter if it is done in an impartial manner and does not influence the jury with the judge's personal contentions. The trial court's denial of Trotter's request for a continuance to investigate the witness's testimony regarding the storm resetting of the video

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57. 733 N.E.2d 527 (Ind. Ct. App. 2000), *trans. denied*, No. 49A02-0002-CR-78, 2001 Ind. LEXIS 22, at \*1 (Ind. Jan. 11, 2001).

58. *See id.* at 529-30.

59. *See id.* at 530.

60. *See id.* at 531-32.



timestamping was also found not to be an abuse of discretion. The court of appeals said that Trotter had the opportunity to examine these materials and investigate discrepancies prior to trial; therefore, no continuance was necessary.<sup>61</sup>

#### *F. Separation of Witnesses*

Rule 615 states that a court "shall order witnesses excluded so that they cannot hear the testimony of or discuss testimony with other witnesses."<sup>62</sup> The rule excludes parties and persons "whose presence is shown by a party to be essential to the presentation of the party's cause."<sup>63</sup>

In *Hernandez v. State*,<sup>64</sup> the appellant argued that the trial court committed reversible error by allowing the victim to stay seated at the prosecutor's table despite a valid order from the court for separation of witnesses. Prior to the adoption of the Rules, the decision to grant a separation of witnesses request was within the discretion of the trial court. Under the Rules, however, a trial court is required to grant a motion for separation of the witnesses. Hernandez contended that the State gained an unfair advantage because the victim was allowed to hear the testimony of thirteen other witnesses concerning his actions and the events leading up to the stabbing.<sup>65</sup>

In upholding the trial court's finding that the witness was an "essential witness" under Rule 615(3), the supreme court noted that the movant must demonstrate that the witness has special knowledge of the facts or has such specialized expertise that the party's attorney could not function effectively without the presence of the witness.<sup>66</sup> This test was met by the State's pre-trial showing that the witness was the only person with "personal knowledge of all the particulars of its case."<sup>67</sup> The court noted that the "typical exemption under Rule 615(3) involves an expert witness or case agent and not a 'fact and opinion witness;'"<sup>68</sup> however, this witness was indeed necessary and essential due to the defendant's theory of the case and long history with the witness.<sup>69</sup>

A similar claim of violation of a separation of witnesses order was raised in *Stafford v. State*.<sup>70</sup> Stafford had filed a motion for separation of witnesses to limit the investigating officers' presence in the courtroom. Stafford objected that allowing more than one police officer in the room violated Rule 615, which allows "an officer or employee of a party that is not a natural person" to remain

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61. See *id.* 532-33.

62. IND. R. EVID. 615.

63. *Id.*

64. 716 N.E.2d 948 (Ind. 1999).

65. See *id.* at 950.

66. *Id.*

67. *Id.* at 951.

68. *Id.* at 951 n.3 (citation omitted).

69. See *id.*

70. 736 N.E.2d 326 (Ind. Ct. App. 2000).



in the courtroom.<sup>71</sup> The court agreed with Stafford finding that the rule clearly contemplated *an* [singular] *officer*.<sup>72</sup> The proper method for approaching a violation of Rule 615 on appeal is to "presume prejudice, which presumption can be overcome if the non-movant can show there was no prejudice."<sup>73</sup> Here, the court found that Stafford had not been prejudiced by the presence of the two officers and declined to overturn the conviction on the basis of this error.<sup>74</sup>

The court went on to state that, while it was not done in this case, the two officers could have remained in the room by designation under separate exceptions to Rule 615. This could be accomplished by designating one officer as a party's designated representative and the other as an essential witness. The state of the law regarding Rule 615 may not be settled. A second Indiana Court of Appeals case, *Vinson v. State*,<sup>75</sup> held that more than one officer can remain in the courtroom under Rule 615's officer exception. The *Vinson* court stated that because both officers were assisting in the case, they both "clearly qualif[ied] for the second exemption from exclusion as provided in" Rule 615.<sup>76</sup> The *Vinson* court did not consider the wording of Rule 615 to mean that only one officer may fit under Rule 615's second exemption. In fact, the appellant had specifically claimed error because Rule 615 "allows only one officer . . . to remain in the courtroom during trial."<sup>77</sup> The court of appeals' disagreement over the proper interpretation of Rule 615 warrants monitoring by Indiana practitioners.

#### IV. OPINIONS AND EXPERT TESTIMONY

##### *A. Witnesses Not Testifying as Experts*

In *Vinson*, discussed above, *Vinson* claimed that the trial court erred in allowing an officer to testify that *Vinson*'s clothing was the same as that of the perpetrator in a video surveillance tape.<sup>78</sup> The State argued on appeal that the officer's testimony was "permissible as opinion testimony by a lay witness."<sup>79</sup>

Rule 701 states that if the witness is not testifying as an expert, "the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination

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71. *Id.* at 329 (quoting IND. R. EVID. 615).

72. *See id.* at 330.

73. *Id.* at 331 (citing *Hernandez v. State*, 716 N.E.2d 948, 955 (Ind. 1999) (Boehm, J., dissenting)).

74. *See id.*

75. 735 N.E.2d 828 (Ind. Ct. App. 2000), *trans. denied*, 741 N.E.2d 1260 (Ind. 2000).

76. *Id.* at 831.

77. *Id.*

78. *See id.* at 835.

79. *Id.*



of a fact in issue."<sup>80</sup> In *Gibson v. State*,<sup>81</sup> the court of appeals found that no previous Indiana case had addressed the issue of allowing lay witness testimony by a non-eyewitness regarding the identity of a person depicted in a surveillance videotape. Because no precedent existed, and because Rule 701 is identical to Federal Rule of Evidence 701, the court looked to the Federal Rules of Evidence for guidance. This comparison led the *Gibson* court to permit such testimony under Rule 701 "as long as there is a basis for finding that the witness has superior ability to identify the defendant."<sup>82</sup> Along the same line of reasoning as *Gibson*, the *Vinson* court found no abuse of discretion by the trial court in letting the officer testify regarding his opinion of Vinson's identity on the videotape because he had viewed the video fifteen or twenty times. The multiple viewings allowed the trial court to conclude that the officer was more likely than the jury to identify Vinson from the video.<sup>83</sup>

In another case discussing Rule 701, *Cutter v. State*,<sup>84</sup> the murder and rape victim's partner, Long, testified at trial as to the unusual dilation of the victim's vagina. On appeal, Cutter argued that Long was not qualified as an expert witness to testify as to the matter of the unusual dilation of the victim's vagina. The supreme court held, however, that Long had testified as a lay witness, not an expert. Because Rule 701 allows a lay witness to testify in the form of opinions or inferences that are rationally based on perceptions and helpful to a clear understanding of the testimony or the determination of a fact in issue, the court found no error in allowing the testimony.<sup>85</sup> Long's testimony that the victim's vagina appeared larger than usual could have helped the jury draw an inference that penetration had occurred and was accomplished by force.<sup>86</sup>

### *B. Reliability of Scientific Principles Utilized by Expert Witnesses*

Rule 702 allows an expert witness to testify in the form of an opinion or otherwise if it "will assist the trier of fact to understand the evidence or determine a fact in issue," but such testimony is only admissible "if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable."<sup>87</sup>

In *Wallace v. Meadow Acres Manufactured Housing Inc.*,<sup>88</sup> the appellants sought to overturn the trial court's grant of summary judgment in favor of the appellees. The appellants had sued the manufacturer and seller of their mobile

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80. IND. R. EVID. 701.

81. 709 N.E.2d 11 (Ind. Ct. App. 1999).

82. *Id.* at 15.

83. *See Vinson*, 735 N.E.2d at 835.

84. 725 N.E.2d 401 (Ind. 2000).

85. *See id.* (citing IND. R. EVID. 701).

86. *See id.*

87. IND. R. EVID. 702.

88. 730 N.E.2d 809 (Ind. Ct. App. 2000), *trans. denied*, No. 02A03-9907-CV-265, 2001 Ind. LEXIS 124, at \*1 (Ind. Feb. 5, 2001).



home claiming health problems stemming from excessive levels of formaldehyde. At trial, the appellants sought to introduce testimony from an expert witness as to the formaldehyde levels in the home on October 8, 1994, as well as the results of a special equation and extrapolation method for determining probable formaldehyde levels at the time of purchase in 1989.<sup>89</sup>

Appellants conceded that they could not prove causation without use of the special equation and the extrapolation formula needed to show formaldehyde concentrations at the time of purchase. The trial court allowed only the testimony regarding the actual levels found in the home. The trial court found that the special equation was an unreliable method and that the extrapolation method was based on a speculative decay rate not supported by scientific methods. Because the appellants could not show causation without the disallowed testimony, the trial court granted summary judgement to the appellees.<sup>90</sup>

The court of appeals noted that, while Rule 702 is not identical to Federal Rule of Evidence 702, the concerns driving the United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>91</sup> coincide with Rule 702's requirement that the trial court be satisfied of the reliability of the scientific principles.<sup>92</sup> The court further noted that "[w]hile these factors may be useful, 'there is no specific "test" or set of "prongs" which must be considered in order to satisfy Indiana Evidence Rule 702(b).'"<sup>93</sup>

At trial, the defense witness, Dr. Godish, was prepared to testify as to what the formaldehyde levels in the home would have been at a temperature of seventy-eight degrees, rather than the actual temperature of 71.5 degrees under which the samples were taken. In order to determine the formaldehyde levels, the witness employed the "Berge Equation," which purports to be a reliable predictor of formaldehyde levels measured under one condition and standardized to another.<sup>94</sup>

The issue raised by the appellants was that the trial court incorrectly required absolute scientific certainty instead of the simple reliability called for by Rule 702. Furthermore, the appellants argued that the trial court should have given greater weight to the witness's education, training, experience, and background, including the fact that he had extensively researched, tested, and published on the topic of formaldehyde.

The trial court found that this testimony by Dr. Godish would be unreliable because: (1) the witness failed to observe certain testing standards required by both his own article and established HUD standards; (2) there was no evidence that the method was generally accepted in the scientific community; and (3) the

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89. See *id.* at 811.

90. See *id.* at 812, 818.

91. 509 U.S. 579 (1993).

92. See *Wallace*, 730 N.E.2d at 813 (citing *Steward v. State*, 652 N.E.2d 490, 498 (Ind. 1995)).

93. *Id.* at 813 (quoting *McGrew v. State*, 682 N.E.2d 1289, 1292 (Ind. 1997)).

94. See *id.* at 814 (citation omitted).



witness testified that the Berge Equation by itself contained a minimum error rate of plus or minus twelve percent.<sup>95</sup>

The witness further wished to testify with respect to what the formaldehyde levels would have been at the time the home was purchased in 1989. This would have been accomplished by starting with the levels established by the Berge Equation and then extrapolating to 1989 by examining the half life or rate of decay of formaldehyde. Unfortunately for the appellants, the witness testified that this methodology would give a worst-case scenario result and that there are no scientific studies which establish a half-life or decay rate for formaldehyde.<sup>96</sup>

The *Wallace* case is significant because it dispelled the argument that opinion testimony from a distinguished expert can overcome unsupported scientific theory. The appellants in *Wallace* argued that great weight should be given to the witness's testimony concerning the reliability of the tests due to his expertise in formaldehyde. The court disagreed, stating that "[w]hile it is clearly helpful that Dr. Godish has previously researched and published in this area for litigation and research purposes, this factor alone is not determinative."<sup>97</sup> The failure of the appellants to demonstrate the reliability required by Rule 702 precluded use of the expert testimony.<sup>98</sup>

Another case making significant clarifications to rules on the use of expert testimony is *Doe v. Shults-Lewis Child & Family Service, Inc.*<sup>99</sup> The Indiana Supreme Court specifically stated that it granted transfer to clarify the role of expert opinion evidence in cases involving repressed memory of childhood sexual abuse and to clarify its decision in *Fager v. Hunt*,<sup>100</sup> in which it previously addressed the admissibility of expert opinion regarding repressed memories of childhood sexual abuse. In *Fager*, the court rejected the plaintiff's claim because she had not submitted "affidavits or depositions of qualified witnesses providing expert opinion to support the scientific validity of repressed memory and to establish that [plaintiff's] normal powers of perception and recollection had been obscured by the phenomenon."<sup>101</sup> The defendant in *Fager* claimed that the statute of limitations, which bars claims arising from childhood injuries unless brought within two years of reaching majority age, disallowed the plaintiff's claim.<sup>102</sup> The plaintiff argued for application of the discovery rule and the tolling of the statute of limitations, which would allow her complaint for injuries

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95. See *id.* at 815.

96. See *id.* at 816-17. The court noted that its decision in this case is consistent with a Third Circuit Court of Appeals decision where expert testimony was excluded because it was based on a speculative decay rate not supported by reliable scientific methods. See *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 162 (3d Cir. 1999).

97. *Wallace*, 730 N.E.2d at 817 (citing *Lytle v. Ford Motor Co.*, 696 N.E.2d 465, 474 (Ind. Ct. App. 1998)).

98. See *id.* In other words, no matter how smart you are, you can't make stuff up.

99. 718 N.E.2d 738 (Ind. 1999).

100. 610 N.E.2d 246 (Ind. 1993).

101. *Id.* at 252.

102. See *id.* at 251 (citing IND. CODE § 34-1-2-5 (repealed 1998)).



suffered during childhood to be timely filed. Instead, the court applied the doctrine of fraudulent concealment to estop the defendants from asserting the statute of limitations.<sup>103</sup>

In *Shults-Lewis*, the plaintiffs brought an action against the defendant children's home for damages due to sexual abuse suffered while the plaintiffs were in custody of the defendant as minors. The plaintiffs claimed to have uncovered repressed memories of the incidents several years after reaching adulthood. The court stated that even where an adult plaintiff bringing an action for childhood sexual abuse can substantiate fraudulent concealment allegations, the plaintiff still needs to present a valid excuse for delay in bringing the action.<sup>104</sup> It is at this point that "repressed memory comes into legal play."<sup>105</sup> Because repressed memory is a concept beyond the comprehension of the normal juror to understand, an expert witness is needed to explain the concept to the jury.<sup>106</sup>

The key issue for the court was whether the grant of summary judgment by the trial court was appropriate. The plaintiffs argued that the expert witness' affidavit claiming the plaintiffs had recovered repressed memories raised a genuine issue of material fact, making summary judgment inappropriate.<sup>107</sup> Interpreting both Rule 702(b) and *Fager*, the court ruled that "an expert opinion affidavit submitted in a summary judgment proceeding, in addition to asserting admissible facts upon which the opinion is based, must also state the reasoning or methodologies upon which it is based."<sup>108</sup> The court also held, "[t]he reliability of the scientific principles need not be established, but the trial court must be provided with enough information to proceed with . . . confidence that the principles used to form the opinion are reliable."<sup>109</sup> Using this standard, the court then found that the grant of summary judgment was inappropriate because the affidavit of the expert witness provided enough information to assure the trial court that the underlying principles were sound.<sup>110</sup>

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103. *See id.*

104. *See Shults-Lewis*, 718 N.E.2d at 748. A plaintiff's excuse for not bringing a timely action may be that the memory of the incidents was repressed or unavailable prior to the time the statute of limitations expired. *See id.*

105. *Id.*

106. *See id.*

107. *See id.* The expert witness, a clinical psychologist and associate professor who had treated several hundred survivors of childhood sexual abuse, based his opinion on an interview with the plaintiffs, his experience with other victims, and his analysis of results of a standardized personality test taken by the plaintiffs. *See id.*

108. *Id.* at 750.

109. *Id.* at 750-51.

110. *Id.* at 751.



## V. HEARSAY

In *Tardy v. State*,<sup>111</sup> Tardy had been convicted of possession of cocaine within one thousand feet of a public park. At trial, the State presented a surveyor's map with lines that represented the extent of the area within one thousand feet of the park. Tardy objected to the admission of the map into evidence, arguing that a typical map does not have one thousand foot radius markings. Nevertheless, the trial court admitted the map as a certified public record under Rule 803(8).<sup>112</sup>

On appeal, Tardy claimed that the alterations to the map constituted inadmissible hearsay. The court described hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."<sup>113</sup> The court of appeals further noted that a statement can be an oral or written assertion and that "[h]earsay is inadmissible except as provided by law or by the rules of evidence."<sup>114</sup> The hearsay exception allowed by the trial court under Rule 803(8), provides an exception for "records and reports setting forth [the office or agency's] regularly conducted and regularly recorded activities."<sup>115</sup>

The court of appeals found that the radius lines had been added for the purpose of litigation, rather than drawn in the course of the surveyor's regular duties as required by 803(8). The court said, "[a]s altered, the map constitutes a written assertion offered to prove that 209 North Randolph Street was within 1,000 feet of Willard Park."<sup>116</sup> The court held that the map, as altered, was not a public record and, therefore, no longer contained the required trustworthiness to remain in the public records exception to hearsay. Nevertheless, the admission of the map into evidence was found to be harmless error. Although possession of cocaine within one thousand feet of a public park raises the criminal penalty to a Class B felony, a park ranger had also testified that he measured the distance with a reliable measuring wheel. Therefore, other evidence existed in the record to show that the crime took place within one thousand feet of a public park.<sup>117</sup>

## VI. AUTHENTICATION OF DOCUMENTS

Several recent cases have involved an appellant challenging the certification of documents admitted into evidence against him or her at trial. Rule 901(b)(10) provides that an item may be authenticated by any method provided the Indiana Supreme Court, statute, or state constitution.<sup>118</sup>

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111. 728 N.E.2d 904 (Ind. Ct. App. 2000).

112. *See id.* at 906.

113. *Id.* (quoting IND. R. EVID. 801(c)).

114. *Id.* at 907 (quoting IND. R. EVID. 802).

115. *Id.* (quoting IND. R. EVID. 803(8)).

116. *Id.*

117. *See id.* at 907-08.

118. *See* IND. R. EVID. 901(b)(10).



In *Hernandez v. State*,<sup>119</sup> the appellant challenged a two-page probable cause affidavit containing a certification stamp and signature of the clerk on only the first page and a three page sentencing order containing a certification stamp and signature of the clerk on only the last page. The supreme court ruled that a seal of a public officer "having official duties in the district or political subdivision in which the record is kept" can authenticate an official record.<sup>120</sup> Moreover, the Indiana Supreme Court held that Indiana Trial Rule 44 does not require certification to take any particular form.<sup>121</sup> In deciding *Hernandez*, the court held that "the certification on a single 'page' of either challenged exhibit provided adequate certification for the entirety of each exhibit as the certification placement 'in no way caus[ed] confusion as to the authenticity of the paper.'"<sup>122</sup>

In *Kidd v. State*,<sup>123</sup> the State introduced three exhibits detailing Kidd's convictions and prior sentences in the State of Washington. All three exhibits consisted of eleven pages with a certification on a final, separate page by the deputy clerk of the court in which Kidd had been convicted.<sup>124</sup> Kidd claimed that the single certification in each exhibit, which did not reference all pages as being certified, was an insufficient certification of multi-page exhibits. Specifically, he claimed that the exhibits required "individualized authentication of each page [or] proper reference to the number of pages being certified so as to make them admissible."<sup>125</sup>

The court disagreed, noting that the facts in the *Hernandez* case were nearly identical to this case, although in *Kidd* the certified documents referred to other criminal proceedings. The documents in *Kidd* had numbered paragraphs, two of the documents had matching cause numbers on the first and last pages, and the third document was marked with an exclusive numerical designation on the first and last pages.<sup>126</sup> The court concluded that there was no error in admitting the documents; furthermore, the court restated the rule that certification on a single page of an official record is adequate for the entire exhibit absent confusion regarding the document's authenticity.<sup>127</sup>

## VII. EVIDENCE OUTSIDE THE RULES

### A. Use of Non-Mirandized Confession at Probation Revocation Hearing

In *Miranda v. Arizona*,<sup>128</sup> the United States Supreme Court held that

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119. 716 N.E.2d 948, 957 (Ind. 1999).

120. *Id.* (quoting IND. TRIAL RULE 44(A)(1)).

121. *See id.* at 951-52.

122. *Id.* at 952 (citation omitted).

123. 738 N.E.2d 1039, 1043 (Ind. 2000).

124. *See id.*

125. *Id.*

126. *See id.* at 1044.

127. *See id.* at 1043-44.

128. 384 U.S. 436, 467-69 (1996).



incriminating statements made while a defendant is in custody and subject to interrogation may not be admitted into evidence unless the defendant waives his Fifth Amendment rights. In *Grubb v. State*,<sup>129</sup> the Indiana Court of Appeals examined the question of whether or not this protection against self-incrimination extended to probation revocation hearings.

The appellant in *Grubb* had been convicted of burglary, had served part of his sentence, and was then placed on probation for the remainder of his sentence. As a condition of his probation, the appellant was ordered not to consume alcohol or to engage in any criminal activity. In addition to a traffic stop in which the appellant had been found to have consumed alcohol, the state received a report alleging that the appellant had molested two different children. These events prompted the State to file a petition to revoke Grubb's probation. Grubb's probation was revoked by the trial court after the introduction of videotaped testimony from the two children and a videotaped confession given by Grubb during a police interview following the molestation accusations. Grubb argued that his confession was taken in violation of *Miranda* and, therefore, should not have been admitted into evidence or used for any purpose.<sup>130</sup>

The court held that *Miranda* warnings were not required to be given as a prerequisite for admitting a confession into evidence at a probation revocation hearing.<sup>131</sup> The court reasoned that the protection against self-incrimination only applies in criminal cases and that previous courts have held that "a probation revocation hearing is in the nature of a civil action and is not to be equated with an adversarial criminal proceeding."<sup>132</sup>

The court in *Grubb* also relied on the logic of *Pennsylvania Board of Probation & Parole v. Scott*,<sup>133</sup> in which the United States Supreme Court refused to extend the Fourth Amendment's exclusionary rule to evidence in probationary hearings. The Supreme Court reasoned that since the exclusionary rule is only applicable where the deterrence benefits outweigh the substantial costs associated with the exclusionary rule, its protections should not be extended beyond criminal trials.<sup>134</sup> The *Grubb* court followed this logic by reasoning that "costs associated with excluding Grubb's statement are high while the deterrence effect on police misconduct of excluding the statement is minimal given the fact that the statement cannot be admitted against Grubb at a criminal trial on molestation charges."<sup>135</sup>

### B. Use of Existing DNA Data

Many questions of first impression have been raised by the relatively recent

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129. 734 N.E.2d 589, 591 (Ind. Ct. App. 2000).

130. See *id.* at 590-91.

131. See *id.* at 592-93.

132. *Id.* (citing *Cox v. State*, 706 N.E.2d 547, 550 (Ind. 1999)).

133. 524 U.S. 357, 363 (1998).

134. See *id.* at 363.

135. *Grubb*, 734 N.E.2d at 592.



advent of DNA evidence. The appellant in *Smith v. State*<sup>136</sup> raised such a question by claiming that the use of his DNA profile, created in a prior unrelated case, constituted an unreasonable warrantless seizure in violation of his U.S. and Indiana constitutional rights as well as section 10-1-9-8 of the Indiana Code. Smith had been arrested for and acquitted of rape in an unrelated case. The trial court had ordered DNA samples taken from Smith. A later computer check matched the DNA taken from Smith in the prior case to DNA recovered from a second rape. At trial, Smith moved to suppress the DNA evidence, but the trial court denied his motion.<sup>137</sup>

The court of appeals found that Smith failed to demonstrate how the State's conduct violated the Fourth Amendment. The Fourth Amendment does protect Smith's "privacy interest not to have the police invade his body and take a blood sample," except when authorized by search warrant or court order.<sup>138</sup> Here, however, Smith did not challenge the court order in the previous case in which the DNA sample was obtained. Instead, Smith challenged the use of the resulting record in the present case.<sup>139</sup>

This use of an existing DNA record was found not to be a violation of the Fourth Amendment. The court analogized the retention of DNA records after an acquittal to the retention of fingerprint records after an acquittal. Using this line of reasoning, the court held that "law enforcement agencies may retain validly obtained DNA samples for use in subsequent unrelated criminal investigations."<sup>140</sup>

In order to establish a claim under the Indiana Constitution, Smith needed to "establish ownership, control, possession, or interest in either the premises searched or the property seized."<sup>141</sup> Because the property in question was a record created by the crime lab, Smith could show no possessory or other interest in the record itself. Therefore, Smith "lack[ed] standing to challenge the Crime Lab's use of its own record."<sup>142</sup>

Smith's final claim was that Indiana statutory law prevented the retention of his DNA record for later use. Indiana law authorizes the establishment of a database of "DNA identification records for convicted criminals, crime scene specimens, unidentified missing persons and close biological relatives of missing persons."<sup>143</sup> Because the statute in question "does not expressly exclude records obtained from other sources," the court held that the existing case law permitting retention of similar records also extends to retention of DNA profiles.<sup>144</sup>

A different approach to the same issue was taken by the Indiana Court of

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136. 734 N.E.2d 706 (Ind. Ct. App. 2000).

137. *See id.* at 708.

138. *Id.* (citing *Schmerber v. California*, 384 U.S. 757, 770 (1966)).

139. *See id.* at 710.

140. *Id.*

141. *Id.* (quoting *Peterson v. State*, 674 N.E.2d 528, 534 (Ind. 1996)).

142. *Id.* at 711.

143. *Id.* (quoting IND. CODE § 10-1-9-8 (2000)).

144. *Id.*



Appeals a few months later in *Patterson v. State*.<sup>145</sup> In this case, Patterson had submitted a blood sample under court order during the investigation of a previous conviction for residential entry, which was used to conduct DNA testing. During investigation of a later, separate robbery and rape, police discovered DNA on broken glass at the scene that matched a new DNA test conducted using Patterson's earlier blood sample. Based in part on this evidence, Patterson was convicted of rape and burglary. Patterson argued on appeal that the police lacked probable cause and therefore should have obtained a search warrant on the basis that the second series of DNA tests were warrantless searches prohibited by the Fourth Amendment.<sup>146</sup>

The court noted that Indiana courts have recently recognized the U.S. Supreme Court's ruling that "the testing of biological samples is a search under the Fourth Amendment."<sup>147</sup> The court then analyzed whether a warrant was required to conduct the second series of DNA tests. In order to make this determination, the court used the Fourth Amendment explanation found in *State v. Overmyer*,<sup>148</sup> which states that the Fourth Amendment protects "people from unreasonable government intrusions into those areas of an individual's life in which he has a legitimate expectation of privacy."<sup>149</sup> The balancing test of *Wyoming v. Houghton*,<sup>150</sup> which calls for a comparison of the degree of intrusion on the individual's privacy with the promotion of legitimate governmental interests,<sup>151</sup> was used to analyze the need for a warrant.<sup>152</sup>

The court found that the second series of DNA tests did not involve "the invasion of Patterson's body nor the release of information unrelated to the performance of the . . . tests."<sup>153</sup> The court further determined that the State has a substantial interest under the Fourth Amendment in "promoting the use of DNA testing, not only in creating a database, but also in conducting criminal investigations and exonerating the innocent."<sup>154</sup> The court agreed with Patterson that the State had intruded on his privacy by conducting the second test, but that his privacy interest was outweighed by the State's interest in protecting its citizens.<sup>155</sup>

The court then separately analyzed whether Patterson had a reasonable expectation of privacy in a blood sample lawfully obtained, but later used in an unrelated criminal investigation. The court stated that no evidence in the record demonstrated Patterson had exhibited any expectation of privacy in the original

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145. 742 N.E.2d 4 (Ind. Ct. App. 2000).

146. *See id.* at 6-8.

147. *Id.* at 9.

148. 712 N.E.2d 506 (Ind. Ct. App. 1999).

149. *Id.* at 507.

150. 526 U.S. 295 (1999).

151. *See id.* at 299-300.

152. *See Patterson*, 742 N.E.2d at 9-11.

153. *Id.* at 9-10.

154. *Id.* at 11.

155. *See id.*



blood sample, that society was not prepared to recognize such a privacy interest as reasonable, and that because he became a convicted felon due to the earlier incident, he was already required by state law to provide a DNA sample for the state databank. The court concluded that since Patterson had no reasonable expectation of privacy in the blood sample, no Fourth Amendment protections were invoked.<sup>156</sup>

*C. 'Use of Toxicological Tests Held by Third Parties*

The Indiana Supreme Court weighed in on an issue related to DNA testing in *Oman v. State*.<sup>157</sup> In this case, Oman, a firefighter, was involved in an accident while driving a firetruck to the scene of an emergency. Pursuant to a city ordinance, Oman was required to submit to a urine test following the accident. The city ordinance requiring the tests states that the results will remain confidential, but that disclosure will be made when "compelled by law or by judicial and administrative process."<sup>158</sup> An anonymous tip claimed that Oman's test results were positive, and the prosecutor issued a subpoena *duces tecum* ordering the testing lab to produce the results. On the basis of the results, Oman was charged with operating a vehicle with a controlled substance in his blood. Oman's motion to suppress his test results was denied, and he appealed.<sup>159</sup>

First, Oman challenged the ability of the prosecutor to issue a subpoena *duces tecum* without consulting a court.<sup>160</sup> In response, the court issued a new rule of criminal procedure that applies to all subsequent investigative subpoenas. The court held that "[a] prosecutor acting without a grand jury must first seek leave of court before issuing a subpoena *duces tecum* to a third party for the production of documentary evidence."<sup>161</sup> Unfortunately for Oman, the court in his case found no reversible error because this rule had not yet been enunciated and, furthermore, the requirements of the Fourth Amendment had been satisfied.<sup>162</sup>

To begin its Fourth Amendment analysis, the court referred to two United States Supreme Court decisions upholding the constitutionality of government employee testing programs.<sup>163</sup> These cases recognized a "special needs" departure from normal Fourth Amendment requirements for employees engaged in safety-sensitive tasks.<sup>164</sup> The cases stated that these programs were for administrative purposes and were not designed as a pretext for law enforcement

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156. See *id.*

157. 737 N.E.2d 1131 (Ind. 2000).

158. *Id.* at 1134.

159. See *id.* at 1133-34.

160. See *id.* at 1135-38.

161. *Id.* at 1138.

162. See *id.* at 1138 n.10.

163. See *id.* at 1142 (citing *Nat'l Treasury Employees Union v. Von Rabb*, 489 U.S. 656 (1989); *Skinner v. Ry. Lab. Executives' Ass'n*, 489 U.S. 602 (1989)).

164. See *id.* (citing *Von Rabb*, 489 U.S. at 665-66).



information gathering.<sup>165</sup>

Second, Oman argued, and the Indiana Court of Appeals agreed, that results of administrative, employer drug tests could never be used as a basis for criminal investigations or trials. The Indiana Supreme Court disagreed, making a distinction between prosecution for simply testing positive on random or pre-employment drug screens and those gathered in accident-triggered tests.<sup>166</sup>

Finally, Oman argued that he was compelled to submit to post-accident testing. The court dismissed this claim by stating that “[t]oxicological samples, however, are simply not evidence of a testimonial or communicative nature protected by the Fifth Amendment.”<sup>167</sup> The supreme court added that Oman had agreed to post-accident drug testing as a condition of his employment and could have either sought employment elsewhere or taken the mandatory thirty-day suspension with possible termination in lieu of submitting to the toxicological testing. The court summarized this portion of its holding by stating, “the results of Oman’s administrative drug test can be used in a criminal prosecution against him, but only if obtained by valid legal process externally initiated from the employment setting.”<sup>168</sup>

#### *D. Application of the Exclusionary Rule to Controlled Substance Excise Tax Searches*

In *Adams v. State*,<sup>169</sup> a police detective obtained a warrant to search safe deposit boxes belonging to Adams. The detective discovered cocaine in the boxes, but the warrant was determined to be invalid. The resulting evidence was suppressed because it was based on stale information that indicated possible marijuana possession. The day before the prosecutor dismissed the charges, the Indiana Department of Revenue issued a Jeopardy Tax Assessment Notice based on the illegally seized cocaine.<sup>170</sup>

A warrant was then issued to collect the civil tax debt for the cocaine under Indiana’s Controlled Substance Excise Tax (CSET). During the ensuing search of Adams’s home, more cocaine was discovered in the stove and in a bedroom drawer, for which Adams was subsequently prosecuted. Adams argued that the cocaine found during the tax warrant search should be suppressed under the fruit of the poisonous tree doctrine since the tax investigation stemmed from the original invalid warrant.<sup>171</sup>

The court of appeals noted that this was a case of first impression in Indiana. Because the Indiana Supreme Court had previously decided that assessment of

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165. *See id.*

166. *See id.* at 1143-44.

167. *Id.* at 1144.

168. *Id.* at 1146-47.

169. 726 N.E.2d 390 (Ind. Ct. App.), *vacated by* No. 49S04-0011-CR-627, 2000 Ind. LEXIS 1098, at \*1 (Ind. Nov. 3, 2000).

170. *See id.* at 391-92.

171. *See id.* at 392-93.



the CSET invokes double jeopardy<sup>172</sup> and because of the criminal implications of this type of situation, the court extended the protection of Fourth Amendment analysis to CSET searches and seizures. Therefore, the court found that the exclusionary rule applied in this case, and the trial court should have granted Adams's motion to suppress.<sup>173</sup>

The State also argued in *Adams* that there was existing federal case law suggesting that the exclusionary rule does not apply to tax warrants.<sup>174</sup> In *United States v. Janis*,<sup>175</sup> the United States Supreme Court held that "the exclusionary rule precluding use of . . . suppressed evidence in the state criminal proceeding should not be extended to preclude its use by the IRS in subsequent tax collection proceedings."<sup>176</sup> The court of appeals rejected this argument and found that the facts of the present case were distinct.<sup>177</sup> The court noted that *Janis* contemplates the use of previously suppressed evidence in a tax proceeding, whereas Adams was faced with the subsequent use of the suppressed evidence to support additional criminal charges against him.<sup>178</sup> Another distinction was that *Janis* involved state-suppressed evidence later used by the federal Internal Revenue Service, while *Adams* involved only state actors. Moreover, in *Adams*, the criminal investigators had worked closely with the tax officials. The court stated that not extending the exclusionary rule to these cases would allow the State to illegally seize evidence and then use that evidence for subsequent tax proceedings.<sup>179</sup> As the Indiana Supreme Court has accepted transfer on this case, it bears monitoring by Indiana practitioners.

### CONCLUSION

Although these decisions answered many questions regarding interpretation of the Rules, many subjects remain open to interpretation. This is not surprising, given that the Rules have been in effect for less than a decade.

Interested practitioners and academicians should continue to keep a close watch on developments in interpretation of the Rules. Their relatively recent promulgation, combined with gap-filling by common and statutory law, as well as the advent of new technologies (such as DNA record-keeping), which have not previously been considered under the Rules, make them easily susceptible to significant change by a single court decision or in a short amount of time.

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172. See *id.* at 393 (citing *Bryant v. State*, 660 N.E.2d 290 (Ind. 1995)).

173. See *id.* However, the court stated that this was a narrow decision, based on judicially determined illegal evidence. The court made no decision regarding cases where a prosecutor might first dismiss or fail to file charges because he realizes that the evidence would not survive a motion to suppress. See *id.* at 393 n.6.

174. See *id.* at 394.

175. 428 U.S. 433 (1976).

176. *Id.* at 454.

177. *Adams*, 726 N.E.2d at 394.

178. See *id.*

179. See *id.* at 395.



# A NEW ERA DAWNS IN APPELLATE PROCEDURE

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## INTRODUCTION

This Article examines recent developments in the area of appellate procedure in Indiana. For appellate practitioners, the two-year time frame<sup>1</sup> surveyed in this Article was one of the most significant periods in Indiana history. Two events of monumental importance to appellate law occurred during the time period covered herein.

On January 1, 2001, an amendment to the appellate rule governing the jurisdiction of the Indiana Supreme Court became effective.<sup>2</sup> That amendment, made possible through a change to the Indiana Constitution, made the docket of the state's high court almost exclusively discretionary.<sup>3</sup> On that same date, an entirely new set of Rules of Appellate Procedure went into effect.<sup>4</sup>

In addition to these far-reaching developments, a number of opinions of great significance were issued during the survey period, including two decisions of the United States Supreme Court that affect appellate practice in Indiana.

## I. A CHANGE IN SUPREME COURT JURISDICTION

The Indiana Constitution formerly required the Indiana Supreme Court to exercise direct appellate jurisdiction over all appeals in which a sentence of death, life in prison, or a term in excess of fifty years on one count was imposed.<sup>5</sup> However, on November 7, 2000, Indiana voters took the final step in amending

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1. The analysis of relevant case law will encompass a two-year survey period, rather than the usual one-year time frame. This additional review is included because last year's survey Article on appellate procedure was dedicated to an examination of the newly promulgated Rules of Appellate Procedure. See George T. Patton, Jr., *Recent Developments in Indiana Appellate Procedure: New Appellate Rules, a Constitutional Amendment, and a Proposal*, 33 IND. L. REV. 1275 (2000).

2. See IND. CONST. art. VII, § 4 (amended 2000).

3. See *infra* notes 5-26 and accompanying text.

4. See *infra* notes 32-33 and accompanying text. The survey period spans a time frame during which the older, superceded Rules of Appellate Procedure were in effect. In order to avoid confusion about which version of the rules is being referenced, the superceded rules will be referred to as "former Appellate Rule." Any citation that does not use the word "former" will be a reference to the new rules effective January 1, 2001.

5. See IND. CONST. art. VII, § 4 (amended 2000).



the state's constitution. Now, the Indiana Constitution requires that the state's high court exercise direct appellate jurisdiction only where a sentence of death has been imposed.<sup>6</sup> Some background to the amendment may help underscore its importance.

In 1995, the legislature raised the presumptive sentence for murder to fifty-five years.<sup>7</sup> This change increased the number of criminal appeals transmitted directly to the supreme court from a low of thirty-seven cases in 1992<sup>8</sup> to 112 cases in 1997.<sup>9</sup> The effect of this increase was to substantially inhibit the ability of the Indiana Supreme Court, as the court of last resort, to accept jurisdiction over discretionary civil appeals.<sup>10</sup> The "tide of direct appeals" of criminal convictions pushed aside cases of importance to all Indiana citizens, such as those involving family law, landlord-tenant disputes, and consumer rights.<sup>11</sup>

The only way the problem could be remedied was to amend the Indiana Constitution. The constitution itself sets out the procedures for change: any amendment must be proposed as legislation, successfully pass two sessions of the General Assembly, and then be approved by the voters in the next general election.<sup>12</sup> After being approved almost unanimously during the legislative sessions in 1998 and 1999,<sup>13</sup> the proposed amendment to the Indiana Constitution was placed on the ballot for the general election in November 2000 as Public Question One. The voters approved the amendment by a sixty-four percent to thirty-six percent margin and the Indiana Constitution was changed.<sup>14</sup>

As mentioned above, the Indiana Supreme Court now has constitutionally-mandated direct jurisdiction over only those appeals in which a sentence of death is imposed.<sup>15</sup> However, the amendment still allowed the supreme court to exercise jurisdiction over non-capital appeals if it elected to do so by rule.<sup>16</sup> The

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6. The amendment to article VII, § 4 reads in substantive part as follows, with the old language which was removed shown in parenthesis: "The Supreme Court shall exercise appellate jurisdiction under such terms and conditions as specified by rules except that appeals from a judgment imposing a sentence of death, (life imprisonment, or imprisonment for a term greater than fifty years) shall be taken directly to the Supreme Court."

7. See Act of July 1, 1995, Pub. L. 148-1995, § 4, 1995 Ind. Legis. Serv. P.L. 148-1995, H.E.A. 1004 (amending IND. CODE § 35-50-2-3(a) by substituting "fifty-five (55)" for "fifty (50)").

8. See IND. JUD. REP. 1992, vol. I, at 12 (Exec. Summ. 1993).

9. See IND. JUD. REP. 1997, vol. I, at 18 (Exec. Summ. 1998).

10. See Chief Justice Randall T. Shepard, *Equal Access to the Supreme Court Requires Amending the Indiana Constitution*, RES GESTAE, Sept. 2000, at 12.

11. *Id.*

12. See IND. CONST. art. XVI, § 1.

13. See Act of Feb. 17, 1998, Pub. L. No. 132-1998, 1998 Ind. Legis. Serv. P.L. 132-1998, H.J.R. 1; Act of Mar. 30, 1999, Pub. L. No. 274-1999, 1999 Ind. Legis. Serv. P.L. 274-1999 H.J.R. 13.

14. See CERTIFICATION OF RATIFICATION (Nov. 7, 2000) (on file with the Indiana Secretary of State); *Public Question Outreach Effort Produced Benefits*, IND. LAW., Dec. 6, 2000, at 4.

15. See IND. CONST. art. VII, § 4(A)(1)(a).

16. See *id.* § 4(A)(2).



court quickly adopted rule changes reflecting this new jurisdictional flexibility. For example, although all appeals in which a definite term of years is imposed will go first to the Indiana Court of Appeals, the Indiana Supreme Court elected to retain jurisdiction over appeals from sentences of life imprisonment without parole.<sup>17</sup>

The court promulgated the rule change effectuating this new division of appellate jurisdiction by order dated November 9, 2000.<sup>18</sup> Under the terms of the order, any appeal that was initiated with the filing of a praecipe before January 1, 2001 will be jurisdictionally governed by the old rule.<sup>19</sup> In other words, the supreme court will continue to take appeals in which a sentence on one count in excess of fifty years was entered so long as the praecipe initiating the appeal was filed before January 1, 2001.<sup>20</sup> This date marks the effectuation of the new appellate rules.<sup>21</sup> The new rules, among other things, abolish the "praecipe"<sup>22</sup> as the document used to initiate an appeal in favor of a "Notice of Appeal."<sup>23</sup> Any appeal commenced by the filing of the new notice of appeal on or after January 1, 2001, will be jurisdictionally governed by the new rule.<sup>24</sup>

The court elected to retain jurisdiction over cases in which a sentence of life imprisonment without parole is entered, even though it was not constitutionally obligated to do so. This relatively minor addition to the court's mandatory appellate jurisdiction seems sensible because sentences of death and life imprisonment without parole are governed by the same sentencing statute.<sup>25</sup> Further, the jurisprudence of the two sentences is similar.<sup>26</sup>

The net effect of the constitutional amendment and accompanying rule change is that for the first time in Indiana history, the state's high court will have almost complete control over its appellate docket. As soon as the last group of fixed-term criminal direct appeals works its way through the system sometime in the year 2002, the Indiana Supreme Court will have the freedom to pick and chose, through the transfer process, the cases that will fill its docket. In other words, the court will be able to speak more frequently about a wider variety of important issues in civil and criminal practice, as befits the state's highest court.

Of course, those hundred-plus appeals no longer handled by the supreme court are not going to just disappear. They now will be the responsibility of an Indiana Court of Appeals that is already laboring under a growing caseload. In

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17. See Ind. Court Order No. 00-18 (Nov. 9, 2000).

18. See *id.*

19. See *id.*

20. See generally *id.*

21. See *id.*; see also *infra* notes 32-36 and accompanying text.

22. See IND. APPELLATE RULE 9(A)(4).

23. See IND. APP. R. 9(A)(1).

24. See Ind. Court Order No. 00-18 (Nov. 9, 2000).

25. See IND. CODE § 35-50-2-9 (1999).

26. See, e.g., *Ajabu v. State*, 693 N.E.2d 921, 937 (Ind. 1998) ("Although this case involves life without parole, death penalty jurisprudence is instructive in construing subsection (b)(1) because subsection (b)(1) applies equally and without differentiation to both sentences.").



2000, there were 2160 appeals transmitted to the Indiana Court of Appeals.<sup>27</sup> That number is certain to climb not simply because of the change in jurisdiction but because of general growth trends.<sup>28</sup> Consider this fact: (conservatively) assuming a caseload of 2150 cases per year, just to stay current, each judge on a fifteen-member appellate court will have to write an average of 143 opinions per year and actively participate in another 286 appeals as a panel member.

A combination of creative leadership, new technology, the assistance of senior judges,<sup>29</sup> and hard work has made it possible for the court of appeals to stay remarkably current in its work. The average age of cases pending before the court of appeals at the end of 1999 was only 1.3 months,<sup>30</sup> an incredible achievement given the volume of cases coming before the court. However, it seems likely that the growing workload will require the Indiana General Assembly to eventually create another panel of the court of appeals.<sup>31</sup> The only real question is when.

## II. THE NEW RULES OF APPELLATE PROCEDURE TAKE EFFECT

Culminating an effort that began several years ago, the new Indiana Rules of Appellate Procedure took effect on January 1, 2001,<sup>32</sup> replacing the old version that had been in effect since January 1, 1970.<sup>33</sup> Generally, the new rules govern all appeals that are initiated on or after January 1, 2001, and the old rules govern those initiated before that date.<sup>34</sup> There are, however, two exceptions. First, if a party files a petition for rehearing, a petition to transfer an appeal to the supreme court, or a petition for supreme court review of a tax court case on or after January 1, 2001, that part of the appeal will be governed by the new rules, regardless of when the appeal was originally initiated.<sup>35</sup> Second, the change in the automatic extension of time to respond to certain documents (discussed under

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27. See INDIANA COURT OF APPEALS, 2000 ANNUAL REPORT (2001) [hereinafter 2000 ANNUAL REPORT].

28. For example, as recently as 1995 there were only 1803 appeals transmitted to the court of appeals. See IND. JUD. REP. 1995, vol. I, at 32 (Exec. Summ. 1996). The last time a panel was added to the court of appeals was 1990. See Act of Mar. 13, 1990, Pub. L. No. 158-1990, 1990 Ind. Legis. Serv. P.L. 158-1990, H.E.A. 1070. In 1988 and 1989, the two years preceding that legislative action, the number of fully briefed appeals coming before the court of appeals was 1222 and 1516, respectively. See IND. JUD. REP. 1988, vol. I, at 28 (Exec. Summ. 1989); IND. JUD. REP. 1989, vol. I, at 26 (Exec. Summ. 1990).

29. See *infra* notes 118-19 and accompanying text.

30. See IND. JUD. SERV. REP. 1999, vol. I, at 17 (Exec. Summ. 2000).

31. "The Court of Appeals shall consist of as many geographic districts . . . as the General Assembly shall determine to be necessary [and e]ach geographic district . . . shall consist of three judges." IND. CONST. art. VII, § 5.

32. See Order No. 94500-0002-MS-77 (Feb. 4, 2000).

33. See IND. APPELLATE RULES (repealed Jan. 1, 2001).

34. See Order No. 94500-0002-MS-77 (Feb. 4, 2000).

35. See *id.*



Timing Changes below) applies to all responses to documents filed on or after January 1, 2001.<sup>36</sup>

Because last year's survey Article provided a detailed discussion of the new appellate rules,<sup>37</sup> this Article will only highlight some of the major changes from the old rules.

### *A. Timing Changes*

The new rules contain two timing changes that are less generous than those under the old rules. First, there is now just a three day automatic extension of time to respond to certain documents that are served by mail or third-party commercial carrier.<sup>38</sup> This makes the automatic extension applicable in appellate proceedings consistent with the provision governing trial court proceedings,<sup>39</sup> but may catch some appellate practitioners who are accustomed to the previous five day automatic extension off-guard.<sup>40</sup> Second, motions for extension of time must now be filed seven days prior to the deadline sought to be extended,<sup>41</sup> rather than the five days allowed by the old rules.<sup>42</sup>

On the other hand, some timing changes are more generous than those under the old rules. The briefing schedule for interlocutory appeals is now the same as for appeals from final judgments, replacing the old ten-ten-five day schedule<sup>43</sup> with a less onerous thirty-thirty-fifteen day schedule.<sup>44</sup> If a reply brief also served as a cross-appellee's brief, the deadline is thirty days rather than fifteen days from the service of the appellee's brief.<sup>45</sup> A party responding to a petition to transfer now has twenty days, rather than fifteen days, from service of the petition within which to file a responsive brief.<sup>46</sup>

### *B. Nomenclature Changes*

The new rules change the names of some familiar documents. The old "praecipe" that initiated an appeal<sup>47</sup> is now called the "Notice of Appeal."<sup>48</sup> This

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36. *See id.*

37. *See* Patton, *supra* note 1, at 1275.

38. *See* IND. APP. R. 25(C).

39. *See* IND. TRIAL RULE 6(E).

40. *See* IND. APP. R. 12(D) (repealed Jan. 1, 2001).

41. *See* IND. APP. R. 35(A).

42. *See* IND. APP. R. 14(A), INDIANA RULES OF COURT, STATE AND FEDERAL 297-308 (2000) (repealed Jan. 1, 2001).

43. *See* IND. APP. R. 8.1(B), INDIANA RULES OF COURT, STATE AND FEDERAL 297-308 (2000) (repealed Jan. 1, 2001).

44. *See* IND. APP. R. 45(B).

45. *See* IND. APP. R. 45(B)(3); Ind. App. R. 8.1(A), INDIANA RULES OF COURT, STATE AND FEDERAL 297-308 (2000) (repealed Jan. 1, 2001).

46. *See* IND. APP. R. 57(D).

47. *See* IND. APP. R. 2(A) (repealed Jan. 1, 2001).

48. *See* IND. APP. R. 2(I).



change necessitated renaming the old "Notice of Appeal"<sup>49</sup> as the "Appellant's Case Summary."<sup>50</sup> The term "petition" is now reserved for a petition for rehearing, a petition to transfer an appeal to the supreme court, or a petition for supreme court review of a tax court case.<sup>51</sup> Any other request for relief is now termed a "motion."<sup>52</sup>

### *C. Initiating an Appeal*

A party initiating an appeal now has a few additional responsibilities. The appellant must pay the filing fee when the notice of appeal is filed, rather than being able to wait up to ninety days.<sup>53</sup> The appellant must also make satisfactory payment arrangements when requesting a transcript.<sup>54</sup> Finally, the appellant must monitor the deadlines for the trial court clerk and the court reporter to complete their duties and seek an order to compel if necessary.<sup>55</sup>

### *D. The Record on Appeal and Appendices*

Conceptually, the biggest changes in the new rules are the way in which the record of the proceeding below is prepared as well as the way in which relevant parts of the record are presented to the appellate court. The old "Record of Proceedings" has been abolished,<sup>56</sup> replaced by a "Record on Appeal," which is broadly defined as consisting of two parts—the "clerk's record" and all proceedings below, whether or not transcribed or transmitted to the appellate court.<sup>57</sup> The clerk's record—the chronological case summary and file maintained by the trial court clerk<sup>58</sup>—is assembled and retained by the trial court clerk throughout the entire appeal.<sup>59</sup> The parties present relevant portions of the clerk's record to the appellate court by including copies in appendices.<sup>60</sup>

The court reporter is responsible for preparing the "transcript" by transcribing the proceedings requested in the notice of appeal.<sup>61</sup> The court reporter is also responsible for requesting extensions of time.<sup>62</sup> Once completed, the court reporter files the transcript with the trial court clerk,<sup>63</sup> where it remains

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49. See IND. APP. R. 2(C) (repealed Jan. 1, 2001).

50. See IND. APP. R. 15.

51. See IND. APP. R. 2(J).

52. See *id.*

53. See IND. APP. R. 9(E).

54. See IND. APP. R. 9(H).

55. See IND. APP. R. 10(F), 10(G), 11(D).

56. See IND. APP. R. 27.

57. See IND. APP. R. 2(L).

58. See IND. APP. R. 2(E).

59. See IND. APP. R. 10(B), 12(A).

60. See IND. APP. R. 50.

61. See IND. APP. R. 2(K), 11(A).

62. See IND. APP. R. 11(C).

63. See IND. APP. R. 11(A).



during the appellant's briefing time in criminal appeals and during the entire briefing time in other cases.<sup>64</sup> It is then transmitted to the appellate court clerk,<sup>65</sup> where it is available for the appellate court's review. Certain parts of the transcript should also be included in the appellant's appendix.<sup>66</sup>

### *E. Briefing*

There are three especially important changes in the briefing procedures. First, the time period for filing the appellant's brief is no longer triggered by an act of the appellant. Under the old rules, the time period began when the appellant filed the record of proceedings.<sup>67</sup> Now the time period begins when the trial court clerk issues a notice that the transcript is complete.<sup>68</sup> Second, a party seeking transfer or review is now allowed to file a reply brief within ten days after the brief opposing transfer or review is served.<sup>69</sup> Third, there is no longer a separate brief in support of a petition for rehearing, transfer, or review. Instead, legal arguments are included in the petition itself, which is bound as a brief.<sup>70</sup>

In addition, the cover colors for some petitions and briefs have changed. Covers for petitions for rehearing and briefs in response are now white.<sup>71</sup> Things get colorful on transfer or review: orange for the petition for transfer or review, yellow for the brief in response, and tan for the reply brief.<sup>72</sup>

## III. CHANGES IN MEMBERSHIP OF THE APPELLATE COURTS

On November 19, 1999, the Honorable Robert D. Rucker was sworn in as the 105th justice of the Indiana Supreme Court, filling the vacancy created by the departure of former Justice Myra C. Selby. Justice Rucker spent the previous eight-plus years serving as a judge on the Indiana Court of Appeals.

The year 2000 saw three new judges join the court of appeals. Justice Rucker's selection for the Indiana Supreme Court created a vacancy that was filled by Judge Nancy H. Vaidik, former judge of the Porter Superior Court. The retirements of Judge Robert H. Staton and Judge William I. Garrard created two additional vacancies that were filled by Judge Michael P. Barnes, an attorney from South Bend, and Judge Paul D. Mathias, former judge of the Allen Superior Court.

These appointments were just the latest in a series that saw the appointment of seven court of appeals judges in less than three years.<sup>73</sup> Remarkably, only one

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64. See IND. APP. R. 12(B).

65. See *id.*

66. See IND. APP. R. 50.

67. See IND. APP. R. 8.1(A).

68. See IND. APP. R. 45(B)(1).

69. See IND. APP. R. 57(E), 63(E).

70. See IND. APP. R. 54(E), 57(F), 63(G).

71. See IND. APP. R. 43(H).

72. See *id.*

73. Judges L. Mark Bailey, Melissa S. Mattingly, Sanford M. Brook, and Margaret G. Robb



of the fifteen judges currently on the court of appeals joined the court before 1989.<sup>74</sup> The court, however, continues to tap the judicial experience of five retired court of appeals judges<sup>75</sup> who assist the court as senior judges.

#### IV. IMPORTANT DEVELOPMENTS IN CASE LAW

In addition to the developments discussed above, there were many noteworthy decisions in the area of appellate procedure during the two-year survey period. The following sections discuss the most important of those opinions.

##### *A. There Is No Federal Constitutional Right to Proceed Pro Se on Appeal*

In *Faretta v. California*,<sup>76</sup> a 1975 case, the U.S. Supreme Court held that a criminal defendant has a constitutional right under both the Sixth Amendment and long-standing historical practices to defend himself at trial without counsel, so long as the defendant voluntarily and knowingly elects to do so.<sup>77</sup> A question left unanswered by *Faretta* was whether the right to defend oneself *pro se*—that is, without the benefit of counsel, extended to appellate proceedings. Both state and federal courts had reached conflicting views on that point.<sup>78</sup> In *Martinez v. Court of Appeal*,<sup>79</sup> the U.S. Supreme Court granted certiorari to resolve that particular question.<sup>80</sup>

Salvador Martinez, who described himself as a self-taught paralegal, represented himself in a California state proceeding on charges of grand theft and embezzlement.<sup>81</sup> Though acquitted on the grand theft count, he was convicted of embezzlement and was also found to be an habitual offender under California law.<sup>82</sup>

Martinez also wanted to represent himself on appeal, and he filed a motion to that effect.<sup>83</sup> The California Court of Appeals denied the motion and the California Supreme Court denied his writ of mandate.<sup>84</sup> The courts in California

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joined the court of appeals in 1998.

74. Judge Patrick D. Sullivan joined the Indiana Court of Appeals (formerly the Appellate Court) in 1969. Seven current members were appointed from 1989 to 1994.

75. The five retired court of appeals judges are Senior Judges Wesley W. Ratliff, Jonathan J. Robertson, George B. Hoffman, Jr., Robert H. Staton, and William I. Garrard. See also *infra* notes 117-18.

76. 422 U.S. 806 (1975).

77. See *id.* at 835-36.

78. See *Martinez v. Court of Appeal*, 528 U.S. 152, 155 n.2 (2000) and the cases cited therein.

79. 528 U.S. 152 (2000).

80. See *id.*

81. See *id.* at 154-55.

82. See *id.* at 155.

83. See *id.*

84. See *id.*



had previously held that the denial of self-representation at the appellate level does not violate the due process or equal protection guarantees of the U.S. Constitution, and it continued to follow that rule in the *Martinez* case.<sup>85</sup>

The U.S. Supreme Court agreed with the California state courts, unanimously concluding that there is no federal constitutional right to self-representation on appeal.<sup>86</sup> There were three principal bases for the Court's decision including, in part, its analysis of the Sixth Amendment right to counsel.<sup>87</sup>

First, unlike trial proceedings, there is no historical practice of self-representation in appellate proceedings, for the simple reason that appeals themselves are of fairly recent origin.<sup>88</sup> Second, because the Sixth Amendment itself creates no right to an appeal, it therefore cannot logically provide a basis for finding a right to self-representation on appeal.<sup>89</sup> Third, because the Sixth Amendment does not apply to appellate proceedings, any right to represent oneself on appeal could only be grounded in the Due Process Clause.<sup>90</sup> However, the court was "entirely unpersuaded" that such a right was "a necessary component of a fair appellate proceeding."<sup>91</sup>

The Court concluded by noting that it is within the discretion of state and federal courts to allow convicted defendants to proceed without counsel on appeal.<sup>92</sup> Further, states are not precluded from recognizing a right to self-representation on appeal under their own constitutions.<sup>93</sup> There is simply no federal constitutional right to proceed *pro se* on appeal.<sup>94</sup> Thus, states are free to require criminal appellants to be represented by counsel even if the appellant objects.<sup>95</sup>

In *Webb v. State*,<sup>96</sup> a 1980 case, the Indiana Supreme Court stated that an appellant *does* have a constitutional right to self-representation on appeal. The court noted that the U.S. Supreme Court had not yet addressed the issue, but expressed the view that "[t]here is no meaningful distinction between conducting a defense at trial and prosecuting an appeal that prevents the application of the *Faretta* rationale to the case of an appellant who wishes to reject representation by counsel and instead represent himself on appeal."<sup>97</sup> There is no clear indication in the opinion that *Webb* was decided on anything other than federal constitutional grounds, so it has seemingly been overruled by *Martinez*.

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85. *Id.* (citing *People v. Scott*, 75 Cal. Rptr. 2d 315, 318 (1998)).

86. *See id.* at 163.

87. *See id.* at 156.

88. *See id.* at 156-59.

89. *See id.* at 160.

90. *See id.* at 161.

91. *Id.*

92. *See id.* at 163.

93. *See id.*

94. *See id.*

95. *See id.*

96. 412 N.E.2d 790, 792 (Ind. 1980).

97. *Id.* at 792.



Nevertheless, the question of any right to self-representation on appeal under the Indiana Constitution remains open.

We cannot predict what the Indiana Supreme Court would say about this issue if faced with it on appeal. However, it may be worth noting that the Indiana Constitution, unlike its federal counterpart, *does* create a constitutional right to an appeal for criminal defendants.<sup>98</sup> However, *Martinez* makes good sense, both analytically and administratively. Moreover, a fundamental difference exists between a person who has yet to be convicted, and thus presumed innocent, and a person who has been convicted, and thus presumed guilty. Those guilty of crimes surrender a number of rights,<sup>99</sup> and the right to self-representation could be one of those lost upon conviction.

Indiana trial courts will likely continue to occasionally allow convicted persons to represent themselves on direct appeal from their convictions, even though they are not obligated to do so by the federal Constitution.

*B. The Filing of a Petition to Transfer Is Required to Exhaust State Remedies Under Federal Law*

Another U.S. Supreme Court opinion of significance to the state appellate system is *O'Sullivan v. Boerckel*.<sup>100</sup> Before a person convicted of a crime in a state court can obtain review of that conviction by a federal court through the habeas corpus process, the convicted person must have exhausted all state remedies.<sup>101</sup> Many states, like Indiana, have a two-tiered appellate system with an intermediate appellate court that handles the vast majority of criminal appeals and a state supreme court employing a discretionary appellate review process.

In *O'Sullivan*, a case arising out of the similarly two-tiered state appellate system in Illinois, the Seventh Circuit Court of Appeals took the position that seeking discretionary review by the state's highest court was *not* a necessary component of the exhaustion requirement,<sup>102</sup> an issue on which federal appellate courts have reached conflicting views.<sup>103</sup> The U.S. Supreme Court granted certiorari to resolve the conflict and it reversed the holding of the Seventh Circuit.<sup>104</sup>

In a 6-3 decision authored by Justice O'Connor, the Supreme Court held that a person convicted of a state crime *must* seek discretionary review from the state's highest court in order to exhaust all state remedies and thus preserve for

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98. See IND. CONST. art. VII, § 6.

99. See, e.g., *Bullock v. State*, 397 N.E.2d 310, 312 (Ind. Ct. App. 1979).

100. 526 U.S. 838 (1999).

101. See *id.* at 839; 28 U.S.C.A. § 2254(b)(1), (c).

102. See *Boerckel v. O'Sullivan*, 135 F.3d 1194 (7th Cir. 1998), *rev'd*, 526 U.S. 838 (1999).

103. Compare, e.g., *Richardson v. Procnier*, 762 F.2d 429 (5th Cir. 1985) (requiring a petition seeking discretionary review by the state high court), with *Dolny v. Erickson*, 32 F.3d 381 (8th Cir. 1994) (petition for discretionary review not required).

104. *O'Sullivan*, 526 U.S. at 838.



habeas corpus review any federal constitutional issues.<sup>105</sup> Because the appellant failed to present his federal constitutional claims in a petition for discretionary review to the Illinois Supreme Court, the Supreme Court determined that he had procedurally defaulted on his federal constitutional claims and they were therefore not available for federal habeas corpus review.<sup>106</sup>

In *Hogan v. McBride*,<sup>107</sup> the Seventh Circuit held in 1996 that seeking transfer to the Indiana Supreme Court from an opinion of the Indiana Court of Appeals was not a procedural prerequisite to seeking federal habeas corpus relief.<sup>108</sup> However, it seems clear that *O'Sullivan* also overrules *Hogan*. In other words, if a person convicted in Indiana wishes to preserve a federal constitutional issue for possible federal review in a habeas corpus petition, that person must seek transfer to the Indiana Supreme Court from an adverse opinion by the Indiana Court of Appeals on that issue.

The U.S. Supreme Court recognized that it may be handing state supreme courts an "increased burden [that] may be unwelcome."<sup>109</sup> The Court did, however, leave open the possibility that states like Indiana could, either by opinion, order, or rule, obviate the effects of *O'Sullivan*.<sup>110</sup> This could be accomplished by plainly stating that under state law, the seeking of discretionary review by the state's high court of a decision by the intermediate appellate court is *not* a requirement in exhausting state remedies.<sup>111</sup> Justice Souter's concurring opinion even gives an example of a state high court that has taken this approach, quoting an order of the Supreme Court of South Carolina.<sup>112</sup>

At the time this Article went to press, the Indiana Supreme Court was still considering whether to adopt such a rule in Indiana. In the months following the issuance of *O'Sullivan*, the number of criminal petitions to transfer filed with the Indiana Supreme Court increased steadily.<sup>113</sup>

Whether the adoption of such a rule would be good for Indiana is a matter of debate. The *O'Sullivan* opinion creates an incentive for attorneys to raise even very weak federal issues in a petition to transfer. When the Indiana Supreme Court considers a petition to transfer in a criminal appeal, each justice examines the court of appeals' opinion, the briefs filed in the court of appeals, all the

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105. See *id.* at 848.

106. See *id.*

107. 74 F.3d 144 (7th Cir. 1996).

108. See *id.* at 147.

109. *O'Sullivan*, 526 U.S. at 847.

110. See *id.* at 847-48.

111. See generally *id.*

112. See *id.* at 849 (Souter, J., concurring).

113. The Indiana Supreme Court received 193 petitions to transfer in the six month period immediately preceding the issuance of *O'Sullivan* (from January 1, 1999 to June 30, 1999). In the six month period immediate following *O'Sullivan* (July 1, 1999 to December 31, 1999), a total of 218 petitions to transfer in criminal cases were filed; from January 1, 2000 to June 30, 2000 that number increased to 243. From July 1, 2000 through December 31, 2000, the number rose again to 256 (reports on file with author).



materials submitted on transfer, and the record of proceedings to review.<sup>114</sup> Only then is a vote taken.<sup>115</sup> The review and individual voting on each petition to transfer is a time-consuming task. One of the grounds for accepting transfer is that the court of appeals "has decided an important federal question in a way that conflicts with a decision of the Supreme Court of the United States or a United States Court of Appeals."<sup>116</sup> The *O'Sullivan* opinion potentially increases the court's workload without necessarily increasing the number of "important" federal questions presented.

On the other hand, the state's high court wants to encourage the filing of petitions to transfer jurisdiction where important federal issues are involved. Adopting a rule that would allow a court of appeals' opinion to stand as the final opinion from which habeas corpus relief could be sought runs somewhat contrary to that policy.

However, it seems reasonable to think that in any case where a potentially important federal constitutional issue is involved, the appellant will seek transfer to the Indiana Supreme Court regardless of *O'Sullivan*. The reason transfer is likely to be sought is because it is in the client's best interest to do so. First and foremost, the transfer process allows an appellant a second chance to obtain relief. Moreover, the likelihood of getting relief from the Indiana Supreme Court is probably higher than the likelihood of obtaining federal habeas corpus relief.

Therefore, adopting a rule similar to the order issued in South Carolina would be a positive development in Indiana. It would obviate the need for appointed appellate counsel to seek transfer in all criminal cases involving federal constitutional rights, regardless of the strength of the issue, as a matter of routine. In that way, the Indiana Supreme Court would be better able to focus on those cases that may involve important issues.

### C. Use of Senior Judges to Decide Appeals Passes Constitutional Muster

The appellate court's decision in *McCullough v. McCullough*,<sup>117</sup> appearing to be a routine appeal, was disposed of in an unpublished memorandum decision authored by a retired senior judge of the court of appeals, Judge Wesley W. Ratliff, Jr.

Following the issuance of the opinion, however, the appellant filed a motion seeking to disqualify Senior Judge Ratliff and to require re-submission of the appeal to a new panel. The appellant argued on various grounds that the appointment of Judge Ratliff in particular and the use of senior judges in the court of appeals in general was unlawful.<sup>118</sup>

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114. See Justice Frank Sullivan, Jr., *Petitions to Transfer: New Rules, New Procedures*, RES GESTAE, Feb. 1996, at 8, 10.

115. See *id.*

116. IND. APPELLATE RULE 57(H)(3).

117. 696 N.E.2d 895 (Ind. Ct. App. 1998) (unpublished table decision).

118. See *McCullough v. McCullough*, 705 N.E.2d 190, 191 (Ind. Ct. App. 1999), *trans. denied*, 726 N.E.2d 302 (Ind. 1999).



By statute, the court of appeals is authorized to use senior judges from that court to assist with the appellate workload.<sup>119</sup> Since 1998, senior appellate judges have played a role in the appellate decision-making arena.<sup>120</sup>

A different panel of court of appeals' judges issued a published opinion rejecting the appellant's arguments and denying the requested relief.<sup>121</sup> Among the holdings of first impression announced by the court in *McCullough* were: (1) the Indiana Supreme Court had the statutory authority to appoint Judge Ratliff at the time of his appointment;<sup>122</sup> (2) the statutes authorizing the appointment of special judges to the court of appeals are not in violation of article VII of the Indiana Constitution;<sup>123</sup> and (3) Judge Ratliff's appointments as both a senior appellate judge and as a senior trial court judge did not violate the prohibition against concurrently holding two lucrative state offices, which is found in article II, section 9 of the Indiana Constitution.<sup>124</sup>

#### *D. Developments in the Area of Published vs. Unpublished Opinions*

The full text of most of the opinions of the court of appeals—about seventy-five percent of the total opinions issued—are not published in the advance sheets or bound volumes of West's Northeastern Reporter.<sup>125</sup> Rather, they are issued as unpublished memorandum decisions.<sup>126</sup> By rule, the court of appeals only publishes opinions that establish, modify, clarify, or criticize existing law or

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119. See IND. CODE § 33-4-8 (1999). That statute was amended in 1998 to specifically allow the Indiana Supreme Court to appoint former judges of the Indiana Court of Appeals to serve as senior judges on that court. See Act of Mar. 11, 1998, Pub. L. No. 33-1988, §§ 1-3, 1998 Ind. Legis. Serv. P.L. 33-1998, S.E.A. 385. However, even prior to that enactment, the Indiana Code empowered the Indiana Supreme Court "to authorize retired justices and judges to perform temporary judicial duties in any court of the state." IND. CODE § 33-2.1-5-1 (1999). Thus, as the court of appeals holds in the opinion discussed in this section, even prior to the specific authorization now found in section 33-4-8 of the Indiana Code, the supreme court had the statutory authority to appoint senior judges to the court of appeals. See *McCullough*, 705 N.E.2d at 192.

120. There were no opinions issued by senior judges in 1997. In 1998, senior judges on the court of appeals issued 168 opinions. See IND. JUD. SERV. REP. 1998, at 25 (Exec. Summ. 1999). In 1999, senior judges issued 138 opinions. See IND. JUD. SERV. REP. 1999, at 28 (Exec. Summ. 2000). In 2000, senior judges on the court of appeals wrote 191 majority opinions. See 2000 ANNUAL REPORT, *supra* note 27.

121. See *McCullough*, 705 N.E.2d at 192.

122. See *id.*

123. See *id.* at 192-96.

124. See *id.* at 196-97.

125. In 1998, the court of appeals published twenty-four percent of its opinions. See IND. JUD. SERV. REP. 1998, vol. I, at 27 (Exec. Summ. 1999). In 1999, twenty-seven percent of the court of appeals' opinions were published. See IND. JUD. SERV. REP. 1999, vol. I, at 30 (Exec. Summ. 2000). In 2000, twenty-six percent of the court of appeals' opinions were published. See 2000 ANNUAL REPORT, *supra* note 27.

126. See IND. APPELLATE RULE 65.



involve a legal or factual issue of unique interest or substantial public importance.<sup>127</sup> Unpublished opinions resolve the rights of the parties, but cannot be cited by others as precedent.<sup>128</sup> The Indiana Court of Appeals has held that there is no due process violation in the issuing of an unpublished memorandum decision.<sup>129</sup>

The Eighth Circuit Court of Appeals created a stir in the area of published versus unpublished opinions with its initial opinion in *Anastasoff v. United States*.<sup>130</sup> The opinion was vacated on rehearing *en banc* and would have had no legal effect in Indiana in any event. Nevertheless, the vacated opinion warrants attention because of the questions it raised.

Circuit Rule 28(A)(i) of the Eighth Circuit, like its Indiana counterpart, states that unpublished opinions have no precedential value and should not be cited by parties in other appeals.<sup>131</sup> In the initial *Anastasoff* opinion, the Eighth Circuit concluded that its own rule was unconstitutional.<sup>132</sup>

The court reasoned that the power constitutionally vested in the federal judiciary in Article III of the U.S. Constitution is founded in substantial part on a duty of courts to follow their own precedent.<sup>133</sup> According to the court, a departure from the system of following precedent would have been deemed by the framers of the Constitution as "an approach to tyranny" and an "abandonment of all the just checks upon judicial authority."<sup>134</sup> Thus, the court concluded, because Rule 28A(i) allowed the court to ignore other decisions of that court simply because they are discretionarily labeled "unpublished," Rule 28A(i) expanded the judicial power beyond the limits set by Article III.<sup>135</sup> Insofar as it limited the precedential effect of the court's prior decisions, the rule was deemed unconstitutional.<sup>136</sup>

The decision quickly sparked interest and debate.<sup>137</sup> Although now vacated as moot, it seems highly likely that the issues raised in *Anastasoff* will be raised again in the Eighth Circuit and elsewhere.

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127. See IND. APP. R. 65(A).

128. See IND. APP. R. 65(D).

129. See *Worldcom Network Servs., Inc. v. Thompson*, 698 N.E.2d 1233 (Ind. Ct. App. 1998).

130. 223 F.3d 898 (8th Cir. 2000), *vacated as moot on reh' en banc*, 235 F.3d 1054 (2000).

131. Compare IND. APP. R. 65 (D).

132. See 223 F.3d at 905.

133. See *id.* at 903.

134. *Id.* at 904.

135. See *id.* at 905.

136. See *id.*

137. See, e.g., Jerome I. Braun, *Eighth Circuit Decision Intensifies Debate over Publication and Citation of Appellate Opinions*, JUDICATURE, Sept.-Oct. 2000, at 90; *Panel Says Unpublished Decisions Are Precedent*, FED. LITIGATOR, Oct. 2000, at 246.



*E. Mootness Issues Revisited*

Mootness issues arise in appellate proceedings with regularity. The general rule is well-settled that moot appeals should be dismissed unless they involve an issue of great public interest that is likely to recur.<sup>138</sup> Two cases from the survey period are of particular interest for their perspectives on the application of the mootness doctrine.

Indiana appellate courts generally follow a policy of deciding constitutional decisions only when necessary.<sup>139</sup> The court of appeals, however, departed from this doctrine of judicial restraint in *Walker v. Campbell*.<sup>140</sup> There, the husband of a child's mother filed a petition to adopt the mother's child. The putative biological father contested the adoption and the putative paternal grandparents sought visitation rights.<sup>141</sup> The trial court granted the adoption petition, and the putative father and grandparents appealed.<sup>142</sup> Before the court of appeals issued an opinion, the appellants moved to dismiss, reporting that a settlement had been reached.<sup>143</sup>

The court of appeals denied the motion and issued an opinion on the merits, reversing the trial court and holding that certain aspects of Indiana's adoption statutes are unconstitutional.<sup>144</sup> The court opined that the settlement gave the father and the grandparents only an illusory promise of visitation.<sup>145</sup> Moreover, the court found, even if the case were moot, it was appropriate to decide the issues presented because they were of great public interest.<sup>146</sup> Indeed, in other recent cases, the court of appeals followed the precept that even if an appeal is moot, the court may still review issues under a "public interest exception" if the case involves a question of great public importance and is likely to recur.<sup>147</sup>

The appellees in *Walker* petitioned for transfer.<sup>148</sup> The supreme court granted the petition for transfer, noted that the court of appeals' opinion was thereby vacated, and then, having jurisdiction over the case, granted the appellants' motion to dismiss.<sup>149</sup>

In a different case, the supreme court decided the merits of an issue over which the trial court lacked jurisdiction and another issue that had become moot.

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138. See *In re Lawrance*, 579 N.E.2d 32, 37 (Ind. 1991).

139. See *Daugherty v. Allen*, 729 N.E.2d 228, 233 (Ind. Ct. App. 2000), *trans. denied*, No. 30A01-9909-CV-309, 2000 Ind. LEXIS 1038, at \*1 (Ind. Oct. 17, 2000).

140. 711 N.E.2d 42 (Ind. Ct. App. 1999), *vacated by* 719 N.E.2d 1248 (Ind. 1999).

141. See *id.* at 46-47.

142. See *id.* at 48.

143. See *id.*

144. See *id.* at 49, 56-57.

145. See *id.* at 48.

146. See *id.* at 48-49.

147. *Union Township Sch. Corp. v. State ex rel. Joyce*, 706 N.E.2d 183, 187 (Ind. Ct. App. 1998); *Bd. of Comm'rs v. Wagoner*, 699 N.E.2d 1196, 1199 (Ind. Ct. App. 1998).

148. *Walker v. Campbell*, 719 N.E.2d 1248, 1248 (Ind. 1999).

149. See *id.* at 1249.



*Cincinnati Insurance Co. v. Wills*<sup>150</sup> involved a challenge to representation of an insured by an attorney employed by the insurer's "captive law firm."<sup>151</sup> The trial court ruled that the representation violated the Rules of Professional Conduct, disqualified the attorney, and issued an injunction against various practices of the insurer.<sup>152</sup>

The insurer and the attorney appealed, and the supreme court accepted immediate transfer under former Appellate Rule 4(A)(9).<sup>153</sup> The supreme court held that the trial court lacked jurisdiction to issue the broad order directed at the insurer.<sup>154</sup> Moreover, the issue regarding the particular attorney was moot because the claim against the insureds had been settled.<sup>155</sup> Still, the supreme court noted that issues relating to the unauthorized practice of law are within the trial court's original jurisdiction.<sup>156</sup> The supreme court decided to address the issue because it was fully developed by the parties and amici curiae, it was important to many members of the bar and their clients, and it affected a number of pending cases.<sup>157</sup> The court observed that there is no case or controversy requirement limiting the jurisdiction of the Indiana Supreme Court, and this case addressed issues that were specifically within the power of the court—regulation of the practice of law.<sup>158</sup>

#### *F. An Appellate Court's Discretion to Overlook Significant Procedural Defects*

The trial court in *Pope by Smith v. Pope*<sup>159</sup> denied a motion to remove an administratrix from an estate but did not certify the order for interlocutory appeal.<sup>160</sup> The order was also not made final and appealable by use of the finality language of Trial Rule 54(B).<sup>161</sup> Nevertheless, the parties proceeded forward as if the order was appealable as a matter of right, and the court of appeals issued an opinion on the merits.<sup>162</sup> The court noted the defect, but elected to exercise its discretion to review this appeal under former Appellate Rule 4(E).<sup>163</sup> The

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150. 717 N.E.2d 151 (Ind. 1999).

151. *Id.* at 153.

152. *See id.* at 153-54.

153. *See id.* at 154. The emergency transfer rule is now IND. APP. R. 56(A).

154. *See Cincinnati Ins. Co.*, 717 N.E.2d at 154.

155. *See id.*

156. *See generally id.*

157. *See id.*

158. *See id.* at 154 n.2.

159. 701 N.E.2d 587 (Ind. Ct. App. 1998).

160. *See id.* at 588 n.1.

161. *See id.* "[T]he court may direct the entry of a final judgment as to one or more but fewer than all the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." IND. TRIAL RULE 54(B).

162. *See Pope*, 701 N.E.2d at 588 n.1.

163. *See id.* The rule has been moved to Appellate Rule 66(B), but it is not substantively



rarely cited rule states:

No appeal shall be dismissed as of right because the case was not finally disposed of in the trial court or Administrative Agency as to all issues and parties, but upon suggestion or discovery of such a situation, the Court may, in its discretion, suspend consideration until disposition is made of such issues, or it may pass upon such adjudicated issues as are severable without prejudice to parties who may be aggrieved by subsequent proceedings in the trial court or Administrative Agency.<sup>164</sup>

Former Appellate Rule 4(E) was invoked again in at least two other cases during the survey period wherein the court of appeals elected to take a case despite a procedural defect.

In *National General Insurance Co. v. Riddell*,<sup>165</sup> arbitrators entered a damage award against National General in the amount of \$220,000.<sup>166</sup> The insurance policy at issue had an "escape clause" which allowed either party to demand a trial if the arbitration award exceeded the policy limits. The insurer invoked the clause and brought suit to resolve the damages issue.<sup>167</sup> The trial court entered an order of partial summary judgment determining that the "escape clause" was void as against public policy and an appeal ensued.<sup>168</sup>

The trial court did not certify its summary judgment order for interlocutory appeal, nor was it made otherwise appealable by the finality language found in Trial Rule 56(C).<sup>169</sup> National General nevertheless argued that the appeal was from an order "for the payment of money" and was thus appealable as a matter of right pursuant to former Appellate Rule 4(B)(1).<sup>170</sup> The court of appeals rejected this argument, and in so doing collected several cases illustrating the types of appeals that the "payment of money" provision contemplates.<sup>171</sup> The court of appeals also concluded that, procedural defect notwithstanding, it would accept jurisdiction over the appeal pursuant to former Appellate Rule 4(E).<sup>172</sup>

A similar procedural situation arose in *Nass v. State ex rel. Unity Team*,

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modified.

164. IND. APPELLATE RULE 66(B).

165. 705 N.E.2d 465 (Ind. Ct. App. 1998).

166. *See id.* at 466.

167. *See id.*

168. *See id.*

169. *See generally id.* Trial Rule 56(C) provides:

A summary judgement upon less than all the issues involved in a claim or with respect to less than all the claims or parties shall be interlocutory unless the court in writing expressly determines that there is not just reason for delay and in writing expressly directs entry of judgment as to less than all the issues, claims or parties.

IND. TRIAL RULE 56(C).

170. *Riddell*, 705 N.E.2d at 466 n. 1. Former Appellate Rule 4(B)(1) may now be found at Appellate Rule 14(A)(1).

171. *See id.*

172. *See id.*



*Local 9212*.<sup>173</sup> In this case, unions representing executive branch state employees brought a complaint for mandamus seeking to compel the state auditor to process wage assignments by non-union employees for “deduction of fair share” payments to the unions.<sup>174</sup> The auditor appealed partial summary judgment in favor of the unions. The auditor did not seek certification to appeal under former Appellate Rule 4(B)(6), but contended that the appeal was a proper interlocutory appeal of right under former Appellate Rule 4(B)(1)—an appeal of an interlocutory order for the payment of money.<sup>175</sup>

The court of appeals was reluctant to declare that the appeal was one of right under former Appellate Rule 4(B)(1), because the auditor admitted that she had no ultimate interest in whether the money at issue was retained by the employees or distributed to the unions.<sup>176</sup> The court of appeals, however, decided that even if the appeal was not properly before the court, it had, in the past, declined to dismiss improperly-brought appeals in cases of significant public interest and where the same issue would be raised in a new appeal.<sup>177</sup> The court of appeals therefore exercised its discretion under former Appellate Rule 4(E) and decided the case on its merits.<sup>178</sup>

#### *G. What Happens When a Court of Appeals Panel Splits Three Ways?*

In *Miller v. State*,<sup>179</sup> the defendant was charged with three counts of attempted murder.<sup>180</sup> After a bench trial, the trial court found the defendant guilty of criminal recklessness.<sup>181</sup> On appeal, the court of appeals’ three-member panel could not agree on the disposition of the defendant’s challenge to these convictions.<sup>182</sup> Judge Mattingly, writing the lead opinion, believed that the defendant’s criminal recklessness convictions must be reversed, but that the trial court could resentence the defendant to three convictions of attempted battery with a deadly weapon.<sup>183</sup> Judge Baker believed the criminal recklessness convictions should be affirmed.<sup>184</sup> Judge Bailey believed the criminal recklessness convictions must be reversed and that double jeopardy principles precluded resentencing for attempted battery with a deadly weapon.<sup>185</sup>

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173. 718 N.E.2d 757 (Ind. Ct. App. 1999), *trans. denied.*, 735 N.E.2d 224 (Ind. 2000).

174. *Id.* at 760.

175. *See id.* at 761-62.

176. *See id.* at 762.

177. *See id.*

178. *See id.*

179. 726 N.E.2d 349 (Ind. Ct. App. 2000), *trans. granted*, No. 49A02-9904-CR-289, 2000 Ind. LEXIS 792, at \*1 (Ind. Aug. 25, 2000).

180. *See id.* at 350.

181. *See id.*

182. *See id.* at 350-51.

183. *See id.* at 353-55.

184. *See id.* at 356 (Baker, J., concurring in part and dissenting in part).

185. *See id.* at 356-58 (Bailey, J., concurring in part and dissenting in part).



The Indiana Supreme Court granted transfer, vacating the court of appeals' opinion, and has not issued an opinion as of the date of this writing.<sup>186</sup> Still, of interest from an appellate practice standpoint is the manner in which the court of appeals handled this three-way split of opinion—an issue of apparent first impression in Indiana. The lead opinion stated:

We believe the correct resolution is that articulated in *Smith v. United States*. Under the *Smith* approach, where a majority of the judges votes that a judgment should be reversed the judgment will be reversed, even though there are several opinions presented which state different grounds for reversal and even though no majority favors any one of the opinions. The effect of a reversal in that situation is to annul the judgment below. The reversal is an adjudication only of the matters expressly discussed and decided—the matters that are decided on appeal become the law of the case in future proceedings on remand and re-appeal. In *Smith*, a majority of the Court found no error with regard to each individual allegation of error. However, “on the question of reversal, the minorities unite, and constitute a majority of the court.” The Court reversed the judgment below and remanded for further proceedings in conformity with its opinion.<sup>187</sup>

The court of appeals rejected the holding of cases such as *State v. Gustafson*,<sup>188</sup> in which the Wisconsin Supreme Court held that when a majority concludes there is prejudicial error but no majority agrees on some specific ground of error fatal to the judgment, the judgment must be affirmed.<sup>189</sup> The *Gustafson* approach could, in some cases, lead to a fundamentally unfair result, and it would be inappropriate in this particular case because a majority agreed on the specific nature of the trial court error, but was unable to agree only on the further disposition of the case in light of that error.<sup>190</sup>

The court of appeals would have remanded to the trial court, presumably “for further proceedings in conformity with its opinion.”<sup>191</sup> The majority, however, decided only that the defendant's criminal recklessness convictions must be vacated.<sup>192</sup> If the supreme court had not granted transfer, it apparently would have been up to the trial court to decide which path to follow on remand. The correctness of that decision presumably could have been challenged in another appeal, but the same deadlock would occur if that appeal were assigned to the same panel.

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186. See *Miller v. State*, No. 49502-0008-CR-505, 2000 Ind. LEXIS 792, at \*1 (Ind. Aug. 25, 2000).

187. *Miller*, 726 N.E.2d at 355 (internal citations omitted).

188. 359 N.W.2d 920 (Wis. 1985).

189. See *Miller*, 726 N.E.2d at 355.

190. See *id.* at 355-56.

191. *Id.* at 355.

192. See *id.*



### H. Date of File-mark Controls, Sometimes

Two opinions issued during the survey period offer a contrast in the significance of a trial court clerk's file-mark date in perfecting an appeal.

One of the issues raised in *Edwards v. Edwards*<sup>193</sup> was whether the record was timely filed, which in turn depended on the date the praecipe was filed.<sup>194</sup> The praecipe was alleged to have been hand-delivered to the trial court clerk on January 23, 1999, and thus arguably should have been file-marked with that date.<sup>195</sup> If that was the proper date to rely upon, then the record of proceedings was not timely filed.<sup>196</sup> However, the actual file-mark date on the praecipe was January 26, 1999, which, if used, made the filing of the record of proceedings timely.<sup>197</sup> The court of appeals determined that the appeal had been perfected, stating: "We use the date file-stamped by the clerk for determining the date filed."<sup>198</sup>

The timing of the filing of the praecipe was at issue in *Cooper v. State*.<sup>199</sup> In *Cooper*, the praecipe was due to be filed July 16, 1999.<sup>200</sup> The file-mark on the praecipe bore a July 20, 1999 date, and the State argued that it was therefore untimely and that the appeal should be dismissed.<sup>201</sup> As in *Edwards*, the file-mark date was apparently erroneous.<sup>202</sup> The praecipe should have been shown as filed July 15, 1999, because that was the day it was mailed.<sup>203</sup> In somewhat of a contrast to the *Edwards* decision, the appellate court in *Cooper* did not consider itself bound by the file-mark date on the praecipe, but instead relied upon the date of mailing, finding that appellate jurisdiction had been properly perfected.<sup>204</sup>

*Edwards* and *Cooper* both demonstrate how the Indiana Court of Appeals will often go to some lengths to address the merits of an appeal, rather than find a technical default.

### I. Standards of Review

A number of opinions during the survey period state the variously applicable standards of appellate review. Only a few stand out as noteworthy.

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193. 709 N.E.2d 1055 (Ind. Ct. App. 1999).

194. See *id.* at 1057.

195. See IND. TRIAL RULE 5(E).

196. See generally *id.*

197. See *Edwards*, 709 N.E.2d at 1057.

198. *Id.*

199. 714 N.E.2d 689 (Ind. Ct. App. 1999), *trans. denied*, 726 N.E.2d 303 (Ind. 1999).

200. See *id.* at 690.

201. See *id.*

202. See *id.*

203. See *id.* (citing Indiana Trial Rule 5(E), made applicable in criminal proceedings by Indiana Criminal Rule 21).

204. See *id.* at 690-91.



In *Sturgeon v. State*<sup>205</sup> the Indiana Supreme Court addressed for the first time the standard of review for decisions to grant or deny a change of judge under the new version of Indiana Criminal Rule 12. The supreme court noted that under the prior version of this rule, the “abuse of discretion” standard was applied.<sup>206</sup> However, “[s]ince Criminal Rule 12 is now neither ‘automatic’ nor ‘discretionary,’ . . . a different standard of review is appropriate.”<sup>207</sup> Now the standard for reviewing a trial judge’s decision to grant or deny a motion for change of judge under Criminal Rule 12 is whether the judge’s decision was clearly erroneous.<sup>208</sup> The court concluded that the historical facts presented in this case did not support a reasonable inference of trial court bias or prejudice.<sup>209</sup> Thus, the trial judge’s decision to deny a change of judge was not clearly erroneous.<sup>210</sup>

In *Anthem Insurance Cos. v. Tenet Healthcare Corp.*,<sup>211</sup> the Indiana Supreme Court clarified a standard of review issue that divided the court of appeals.<sup>212</sup> In *Anthem*, an insurer sued a parent corporation of a chain of psychiatric hospitals along with several subsidiaries and affiliated providers.<sup>213</sup> The trial court granted the motions to dismiss for lack of personal jurisdiction for some but not all of the defendants.<sup>214</sup> The supreme court clarified the standard of review for such determinations. It first noted that court of appeals’ decisions conflict on this issue, with some applying de novo review, and others, including the court of appeals in this case, using an abuse of discretion standard.<sup>215</sup> The supreme court noted that the court of appeals cited as support *Mid-States Aircraft Engines, Inc. v. Mize Co.*,<sup>216</sup> a case reviewing the *procedure* by which a trial court resolves a jurisdictional issue.<sup>217</sup> However, the issue in this case was not the procedure used by the trial court, but the result.<sup>218</sup> Therefore, a de novo standard should be employed to review the question of whether personal jurisdiction exists.<sup>219</sup> Thus, the court of appeals in this case used the incorrect standard of review.<sup>220</sup>

The supreme court then paused to distinguish between findings of fact and

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205. 719 N.E.2d 1173 (Ind. 1999).

206. *Id.* at 1182.

207. *Id.*

208. *See id.*

209. *See id.*

210. *See id.*

211. 730 N.E.2d 1227 (Ind. 2000).

212. *See id.*

213. *See id.* at 1230.

214. *See id.*

215. *See id.* at 1237.

216. 467 N.E.2d 1242, 1247 (Ind. Ct. App. 1984).

217. *See Anthem*, 730 N.E.2d at 1237.

218. *See id.*

219. *See id.* at 1238.

220. *See id.*



conclusions of law in the context of personal jurisdiction.<sup>221</sup> "The legal question of whether personal jurisdiction exists given a set of facts is reviewable de novo."<sup>222</sup> The trial court's findings of jurisdictional facts, however, are reviewed for clear error.<sup>223</sup>

The final case in this category is perhaps more noteworthy for the question it raises rather than for any answer it provides. In *D.B. v. State*,<sup>224</sup> a juvenile found to be delinquent contended that certain evidence should have been suppressed because the search producing the evidence was unconstitutional.<sup>225</sup> The court of appeals upheld the adjudication, stating: "A trial court possesses broad discretion in ruling on the admissibility of evidence, and we will not disturb its decision absent a showing of an abuse of discretion. We find no abuse of discretion here . . ."<sup>226</sup> This was not the first time the court of appeals used an abuse of discretion standard in cases where the issue was admissibility of evidence obtained through allegedly unconstitutional search and seizure.<sup>227</sup> *Harless v. State* cited an Indiana Supreme Court case as supporting authority for an abuse of discretion standard of review.<sup>228</sup> However, that case concerned the admissibility of a redacted transcript, which was not a constitutional issue.<sup>229</sup> If the admission of unconstitutionally seized evidence is prohibited, it seems that the trial court lacks discretion to admit it. The supreme court denied transfer in *D.B.*, but Justice Sullivan voted to grant transfer, "believing it worthwhile to correct the standard of review applicable to the claim at issue here."<sup>230</sup>

*J. Failure to File Appellee's Brief Did Not Preclude Appellee from Seeking Transfer*

In the case of *Weinberg v. Bess*,<sup>231</sup> a medical malpractice defendant moved for summary judgment, contending that the action was time-barred.<sup>232</sup> The trial court denied the motion, and the defendant brought an interlocutory appeal.<sup>233</sup> The plaintiff failed to file an appellee's brief. The court of appeals, applying "a

221. See *id.*

222. *Id.*

223. See *id.*

224. 728 N.E.2d 179 (Ind. Ct. App. 2000), *trans. denied.*, No. 49A04-9911-JV-504, 2000 Ind. LEXIS 831, at \*1 (Ind. Aug. 15, 2000).

225. See *id.* at 181.

226. *Id.* at 182 (internal citation omitted).

227. See, e.g., *D.I.R. v. State*, 683 N.E.2d 251, 252 (Ind. Ct. App. 1997); *Harless v. State*, 577 N.E.2d 245, 247 (Ind. Ct. App. 1991).

228. *Harless*, 577 N.E.2d at 247.

229. See *Kremer v. State*, 514 N.E.2d 1068, 1073 (Ind. 1987).

230. *D.B. v. State*, No. 49A04-9911-JV-504, 2000 Ind. LEXIS 831, at \*1 (Ind. Aug. 15, 2000). See also 741 N.E.2d 1249 (2000) (table).

231. 717 N.E.2d 584 (Ind. 1999).

232. See *id.* at 588.

233. See *id.*



‘less rigorous’ standard of review,” reversed and remanded with instructions to enter summary judgment in favor of the defendant.<sup>234</sup> After the court of appeals denied the plaintiff’s petition for rehearing, the plaintiff filed a petition for transfer, which the supreme court granted.<sup>235</sup> There was no true majority opinion in the usual sense. Instead, two justices joined a plurality opinion, two justices concurred in the result, and one justice did not participate.<sup>236</sup>

The plurality rejected the defendant’s argument that the plaintiff was required to file an appellee’s brief to preserve her claim on transfer.<sup>237</sup> The plurality stated that under Indiana case law, an appellee is not required to file a brief.<sup>238</sup> If the appellee opts to not file a brief, the court may “1) order the appellee to file a brief, 2) consider the issues presented by appellant without aid of appellee’s arguments, or 3) reverse the lower court’s judgment if appellant shows apparent or prima facie error.”<sup>239</sup> Apparently finding the failure to file an appellee’s brief no bar to seeking rehearing, the plurality concluded that a party whose petition for rehearing is denied was entitled to seek transfer under former Appellate Rule 11(B) (now Appellate Rule 57).<sup>240</sup>

#### *K. Interlocutory Appeals—Orders or Issues?*

*Budden v. Board of School Commissioners*<sup>241</sup> is a significant case interpreting Trial Rule 23, which governs class actions. But the case also clarifies exactly what is being certified when a trial court grants leave to seek interlocutory appellate review under current Appellate Rule 14(B).<sup>242</sup> The rule itself states that discretionary interlocutory appeals may be taken from certified “orders” of the trial courts.<sup>243</sup> Nevertheless, the courts have occasionally spoken in terms of certified “issues” or “questions” for interlocutory appeal.<sup>244</sup>

In *Budden*, the trial court certified an order for interlocutory appeal, but had also certified five questions to accompany the certified order.<sup>245</sup> The parties clashed in the trial court over the propriety of the additionally certified

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234. *Id.* at 589 n.7.

235. *See id.* at 589.

236. *See generally id.* at 591.

237. *See id.* at 589 n.9.

238. *See id.*

239. *Id.* (citation omitted).

240. *See id.*

241. 698 N.E.2d 1157 (Ind. 1998).

242. *See id.*

243. *See* IND. APPELLATE RULE 14(B).

244. *See, e.g.,* Figert v. State, 686 N.E.2d 827, 829 (Ind. 1997) (trial court certified “questions for interlocutory appeal”); Rita v. State, 674 N.E.2d 968, 969 (Ind. 1996) (“trial court certified several issues for interlocutory appeal”); Irvine v. Rare Feline Breeding Ctr., Inc., 685 N.E.2d 120, 123 (Ind. Ct. App. 1997) (trial court certified “three issues for interlocutory appeal”).

245. *See Budden*, 698 N.E.2d at 1160.



questions.<sup>246</sup> The supreme court gave a definitive procedural reply:

We affirm today what has been implicit in these and other decisions: although the trial court certifies an order, there is nothing to prohibit the trial court from identifying the specific questions of law presented by the order for the appellate court's review. Indeed, it is often helpful if this occurs. Certification of a question, rather than the technically proper certification of an order, is inconsequential error as long as it is clear what order is affected. Any decisional law suggesting the contrary is disapproved.<sup>247</sup>

These statements are a further clarification of the supreme court's prior holding that the appellate rules do not permit certification of particular issues, only orders, but that issues properly raised in certified orders are available for appellate review.<sup>248</sup>

*L. Issues Raised and Not Raised in Earlier Appeals Involving the Same Case*

One opinion of the Indiana Supreme Court during the survey period made clear that when an issue is squarely raised in an earlier appeal involving the same parties and proceeding, the decision on that issue becomes law of the case. In *State v. Farber*,<sup>249</sup> a pre-trial interlocutory appeal was initiated, and the court of appeals ruled that certain evidence of the defendant's conversation with the police was properly admissible.<sup>250</sup> Farber was ultimately convicted of murder and robbery and he appealed those judgments to the supreme court.<sup>251</sup> Among the allegations of error in the appeal to the supreme court was the assertion that the conversation with the police was inadmissible.<sup>252</sup> Referring to the earlier interlocutory appeal, the court stated that "the question Farber seeks to litigate has already been adjudicated. . . . [W]e will not relitigate it."<sup>253</sup>

But what about issues that *might have been*, but were not raised in an earlier appeal? The general rule is that if an issue is available but not raised for appellate review in an earlier appeal, it cannot be raised in a subsequent appeal.<sup>254</sup> Although this principle was affirmed in *Sleweon v. Burke, Murphy, Constanza & Cuppy*,<sup>255</sup> the court of appeals carved out an exception to the

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246. See *id.* at 1166 n.14.

247. *Id.*

248. See *Harbour v. Arelco, Inc.*, 678 N.E.2d 381, 385-86 (Ind. 1997).

249. 677 N.E.2d 1111 (Ind. Ct. App. 1997).

250. See *id.* at 1115.

251. See *Farber v. State*, 703 N.E.2d 151, 152 (Ind. 1998).

252. See *id.*

253. *Id.* at 153.

254. See, e.g., *Citizens Action Coalition of Ind., Inc. v. NIPSCO*, 582 N.E.2d 387, 391 (Ind. Ct. App. 1991).

255. 712 N.E.2d 517, 521 (Ind. Ct. App. 1999), *trans. denied*, 726 N.E.2d 310 (Ind. 1999).



general rule during the survey period in *Mafnas v. Owen County Office of Family & Children*.<sup>256</sup>

The mother and father in the Mafnas family attempted to appeal an order of the trial court that found their children to be in need of governmental services (CHINS) and directed them to pay for services provided by the county.<sup>257</sup> The appeal was dismissed, however, when they failed to timely file a record of proceedings.<sup>258</sup> Later, the Mafnases brought a separate, subsequent appeal of an order finding them in contempt for failing to make the ordered payments.<sup>259</sup>

In the second appeal, the Mafnases again attempted to challenge the propriety of the initial CHINS determination and payment order.<sup>260</sup> The Owen County Office of Family and Children asserted that the Mafnases were precluded from raising those issues because they were available in the initial appeal that had been dismissed.<sup>261</sup> The court of appeals acknowledged the general rule but distinguished this case on the basis that the issue never got a review on the merits in the first appeal.<sup>262</sup> The court of appeals held that “[w]hen the first appeal is dismissed for failure to meet jurisdictional requirements, the appellant may be allowed, in a subsequent appeal, to raise issues which were raised in the initial appeal.”<sup>263</sup>

### *M. The Role of the Appellate Court in Revising Criminal Sentences*

Scholars of criminal law and appellate procedure may want to read *Bluck v. State*,<sup>264</sup> and in particular the dissenting opinion.<sup>265</sup> In short, the dissent questioned the propriety of the court of appeals, as an intermediate appellate court, reducing criminal sentences found to be “manifestly unreasonable” absent the adoption of more objective criteria for so doing.<sup>266</sup>

The possibility for conflicting views among members of the court of appeals on this topic takes on added weight in light of the jurisdictional change effective January 1, 2001. The court of appeals will now be reviewing all criminal appeals

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256. 699 N.E.2d 1210 (Ind. Ct. App. 1998).

257. *See id.* at 1211.

258. *See id.*

259. *See id.*

260. *See id.*

261. *See id.* at 1211-12.

262. *See id.* at 1212.

263. *Id.*

264. 716 N.E.2d 507 (Ind. Ct. App. 1999).

265. *See id.* at 516 (Garrard, J., dissenting).

266. *Id.* at 517 (citation omitted). The state constitution expressly grants to the supreme court and court of appeals the power to review and revise criminal sentences. *See* IND. CONST. art. VII, §§ 4, 6. That authority is implemented and limited by rule in Indiana Appellate Rule 7(B) (former Appellate Rule 17(B)), which provides that a reviewing court “shall not revise a sentence authorized by statute unless the sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.” IND. APPELLATE RULE 7(B).



except those involving a sentence of death or life without parole.<sup>267</sup> Some criminal sentences falling into this new category will be of extraordinary length,<sup>268</sup> posing potential questions about manifest reasonableness.

*N. The Denial of Relief in an Original Action Is Not Res Judicata  
in a Later Appeal*

*Vermillion v. State*<sup>269</sup> was a direct criminal appeal in which the defendant contended that the trial court erroneously denied his motions for discharge under Indiana Criminal Rule 4(C).<sup>270</sup> The defendant's original action sought a writ of mandamus ordering his discharge, and the supreme court denied the defendant's request.<sup>271</sup> In the criminal appeal, the State argued that the supreme court's denial of a writ of mandamus constituted law of the case, thus barring the defendant from raising the issue on appeal.<sup>272</sup> The supreme court rejected this argument.<sup>273</sup> In the original action, the supreme court concluded that the defendant was not entitled to mandamus after examining both the materials submitted and the law governing original actions.<sup>274</sup> The court noted that an original action may not be used as a substitute for an appeal, and that the face of the record in the original action did not support the defendant's assertion that certain continuances were made necessary by the prosecutor's action.<sup>275</sup>

On the direct appeal, the supreme court concluded that the original action ruling did not foreclose the presentation of the speedy trial claim on appeal.<sup>276</sup> This seems correct because a writ of mandamus is appropriate only if "the remedy available by appeal will be wholly inadequate."<sup>277</sup> It would seem incongruous if a party that was denied a writ of mandamus because its appellate remedy was adequate was later denied any appellate remedy based on the denial of a writ of mandamus.

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267. See *supra* text accompanying notes 5-17.

268. See, e.g., *Byers v. State*, 709 N.E.2d 1024, 1025 (Ind. 1999) (total sentence of 200 years); *Greer v. State*, 684 N.E.2d 1140, 1140 (Ind. 1997) (total sentence of 220 years); *McReynolds v. State*, 460 N.E.2d 960, 961 (Ind. 1984) (total sentence of 270 years).

269. 719 N.E.2d 1201 (Ind. 1999).

270. See *id.* at 1203-04. Criminal Rule 4(C) provides for the discharge of defendants who are made to answer criminal charges for longer than a year, unless the delay is caused by the defendant or due to congestion of the court calendar. See *id.*

271. See *id.* at 1204.

272. See *id.* at 1204 n.5.

273. See *id.*

274. See *id.*

275. See *id.*

276. See *id.*

277. IND. ORIGINAL ACTION RULE 3(A)(6).



*O. Clarity on Timeframe for Seeking Review of IDEM Orders*

In *Wayne Metal Products Co. v. IDEM*,<sup>278</sup> the commissioner of the Indiana Department of Environmental Management (IDEM) issued an order to Wayne Metal Products Company to cease and desist its violations of certain regulations and to pay a civil fine.<sup>279</sup> Twenty days after receiving the order, Wayne Metal filed a written request for further administrative review of the order.<sup>280</sup> The environmental law judge dismissed the petition as untimely, the trial court agreed, and an appeal was taken.<sup>281</sup> The statute at issue reads:

Except as otherwise provided in a notice issued under subsection (c) or in a law relating to emergency orders, an order of the commissioner under this chapter takes effect twenty (20) days after the alleged violator receives the notice, unless the alleged violator requests a review of the order before the twentieth day after receiving the notice by the filing of a written request with the commissioner on a form prescribed by the commissioner.<sup>282</sup>

Noting that the statute says “before” the twentieth day and not “on” or “within” the twentieth day, the court of appeals found the statute unambiguous, and it affirmed the decisions of the lower tribunals.<sup>283</sup>

*P. Late Ruling on Motion to Correct Error Voidable, Not Void*

The supreme court weakened a trap for the unwary or confused in *Cavinder Elevators, Inc., v. Hall*.<sup>284</sup> Indiana Trial Rule 53.3(A) declares that a motion to correct error is deemed denied if the trial court fails to rule within certain time limits.<sup>285</sup> In *Cavinder Elevators*, the trial court granted summary judgment to the defendant, the plaintiff filed a motion to correct error, and the trial court failed to timely rule on the motion.<sup>286</sup> The plaintiff filed a praecipe to initiate an appeal from the deemed denial.<sup>287</sup> Shortly thereafter the trial court granted the plaintiff’s motion based on newly discovered evidence and set aside the prior ruling granting summary judgment.<sup>288</sup> The plaintiff did not further pursue his appeal from the deemed denial of his motion. The defendant, however, initiated an appeal from the order belatedly granting the motion.<sup>289</sup> In his appellee’s brief,

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278. 721 N.E.2d 316 (Ind. Ct. App. 1999), *trans. denied*, 735 N.E.2d 232 (Ind. 2000).

279. *See id.* at 317.

280. *See id.*

281. *See id.*

282. *Id.* (citing IND. CODE § 13-7-11-2(d) (1999)).

283. *Id.* at 319.

284. 726 N.E.2d 285 (Ind. 2000).

285. *See* IND. TRIAL RULE 53.3(A).

286. *Cavinder Elevators, Inc.*, 726 N.E.2d at 286.

287. *See id.*

288. *See id.* at 287.

289. *See id.*



"the plaintiff sought review on the merits of the issues [raised], . . . including the grant of summary judgment and the claim of newly discovered evidence."<sup>290</sup>

The court of appeals held that the trial court's belated ruling granting the motion to correct error and setting aside the summary judgment was a nullity.<sup>291</sup> The court of appeals then addressed the merits of the plaintiff's claim of newly discovered evidence, raised on cross-appeal, and concluded that no error occurred when the plaintiff's motion to correct error based on newly discovered evidence was deemed denied.<sup>292</sup>

The supreme court granted transfer, and the three-member majority first addressed the propriety of the defendant's appeal.<sup>293</sup> The court noted that Trial Rule 59(F) "makes appealable any order 'modif[ying] or setting aside' a final judgment," and that former Appellate Rule 4(A) provided "that a ruling or order by the trial court granting or denying relief on a motion to correct error is an appealable final order."<sup>294</sup> The court then rejected the notion that the "deemed denied" language in Trial Rule 53.3(A) precludes a timely appeal under Trial Rule 59(F) and former Appellate Rule 4(A).<sup>295</sup> The court continued:

Accordingly, we hold that the belated grant of the motion to correct error in this case is not necessarily a nullity but rather is voidable and subject to enforcement of the "deemed denied" provision of Trial Rule 53.3(A) in the event the party opposing the motion to correct error promptly appeals. Had the defendant failed to promptly appeal this belated grant, such failure would constitute waiver and would have precluded a subsequent appellate claim that the motion to correct error was deemed denied under Trial Rule 53.3(A).<sup>296</sup>

Thus, the defendant was procedurally correct in appealing the belatedly granted motion to correct error.

The court then turned to the plaintiff's procedural options. The court held that the party filing the motion to correct error may seek appellate review on the merits of the "deemed denied" motion.<sup>297</sup> The moving party preserves its right to appeal when it properly files a well-founded motion to correct error and timely files a praecipe when the trial court has failed to act within the Rule 53.3(A) period, even if he thereafter receives an order from the court granting the relief requested.<sup>298</sup> If the opposing party appeals the belated order granting relief, the moving party may reassert the issues raised in the "deemed denied" motion to

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290. *Id.*

291. *See id.*

292. *See id.*

293. *See id.*

294. *Id.*

295. *Id.* at 287-88.

296. *Id.* at 288.

297. *See id.*

298. *See id.*



correct error in its appellee's brief.<sup>299</sup>

The court concluded as follows:

Summarizing our conclusions regarding the "deemed denied" problem, we reiterate that the belated grant of the plaintiff's motion to correct error in this case was not a nullity but rather was voidable subject to the defendant's timely appeal under Trial Rule 59(F) and [former] Appellate Rule 4(A). If the defendant had failed to promptly appeal the belated grant of such a motion, however, this failure would have waived and thus precluded subsequent appellate review of whether the trial court's ruling violated Trial Rule 53.3(A). Because the defendant promptly appealed from the belated grant of the motion to correct error, and because the plaintiff timely commenced his appeal from the Rule 53.3(A) deemed denial of his motion to correct error, the defendant's appeal should be considered, as should the plaintiff's issues raised as cross-errors under Trial Rule 59(G). However, if the plaintiff, as the party filing the motion to correct error, had failed to commence a timely appeal following the deemed denial pursuant to Trial Rule 53.3(A), such failure would have waived the claims and precluded the plaintiff from raising them as cross-errors on appeal.<sup>300</sup>

The court then reversed the entry of summary judgment for defendant and remanded to the trial court.<sup>301</sup>

*Q. When Is a Motion to Correct Error Not a Prerequisite to Appeal?*

The Indiana Supreme Court rendered a short but significant opinion interpreting Trial Rule 59 during the survey period. As a prerequisite to perfecting an appeal, Trial Rule 59(A)(2) requires that a motion to correct error be filed if the party is claiming that "a jury verdict is excessive or inadequate."<sup>302</sup> The appellant in *Tipmont Rural Electric Membership Corp. v. Fischer*<sup>303</sup> argued on appeal that a jury verdict entered in the underlying proceeding was *outside the*

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299. See *id.*

300. *Id.* at 289. The dissent would hold that the trial court's belated granting of the motion to correct error was a nullity, that the defendant could not appeal from a nullity, that the plaintiff's failure to perfect his earlier initiated appeal resulted in forfeiture of his appeal, and that the court therefore lacked jurisdiction over the attempted appeals. See *id.* at 290-92 (Sullivan, J., dissenting).

301. See *id.* at 290.

302. IND. TRIAL RULE 59(A). A motion to correct error is also a mandatory prerequisite to an appeal if a party seeks to address "[n]ewly discovered material evidence, including alleged jury misconduct, capable of production within thirty (30) days of final judgment and which, with reasonable diligence, could not have been discovered and produced at trial." T.R. 59(A)(1). "All other issues and grounds for appeal appropriately preserved during trial may be initially addressed in the appellate brief." T.R. 59(A).

303. 716 N.E.2d 357 (Ind. 1999).



scope of the evidence.<sup>304</sup> The court of appeals held that the issue regarding whether the damages were outside the scope of the evidence had been waived because Tipmont had not filed a motion to correct error challenging the alleged excessiveness of the verdict.<sup>305</sup>

The supreme court granted transfer to clarify a point of appellate procedural law.<sup>306</sup> The court held that when Trial Rule 59(a)(2) speaks of a jury verdict being "inadequate or excessive," the rule is referring to the common-law doctrines of additur and remittitur.<sup>307</sup> Additur is a trial court order, or the procedure by which the order is entered, used to increase a damage award, usually with the defendant's consent, in lieu of granting a new trial because of patently inadequate damages.<sup>308</sup> Similarly, remittitur is a trial court order, or the procedure by which the order is entered, used to reduce or propose to reduce a patently excessive portion of a damage award to avoid relitigation.<sup>309</sup>

The court distinguished those concepts from the case at hand, where the appellant presented the "more ordinary question about the sufficiency of the evidence supporting the verdict."<sup>310</sup> The court held that when the alleged error is that the damage award is outside the scope of the evidence, it may be presented to the appellate court without the need for filing a motion to correct error.<sup>311</sup>

The court of appeals also rendered an opinion applying Trial Rule 59 during the survey period. In *Marsh v. Dixon*,<sup>312</sup> the plaintiff brought a products liability claim in which he had to overcome a release of liability he had signed.<sup>313</sup> The trial court entered summary judgment for the defendants, and then the plaintiff filed a "non-mandatory" motion to correct error.<sup>314</sup> Trial Rule 59(A) states that the filing of a motion to correct error is a prerequisite to an appeal only when a party raises issues relating to newly discovered evidence or a claim that a jury verdict is excessive or inadequate.<sup>315</sup> In this instance, the plaintiff's motion to correct error raised only two issues: (1) whether the evidence created a genuine issue of material fact so as to preclude the entry of summary judgment, and, (2)

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304. See *id.* at 358.

305. See *Tipmont Rural Elec. Membership Corp. v. Fischer*, 697 N.E.2d 83, 89 (Ind. Ct. App. 1998), *aff'd*, 716 N.E.2d 357 (Ind. 1999). Despite the finding of waiver, the court of appeals nevertheless addressed the issue on the merits, finding that the verdict was within the scope of the evidence. See *id.* at 89-90.

306. See *Fischer*, 716 N.E.2d at 357.

307. *Id.* at 358.

308. See BLACK'S LAW DICTIONARY 39 (7th ed. 1999).

309. See *id.* at 1298.

310. *Fischer*, 716 N.E.2d at 358.

311. See *id.* The court summarily affirmed the opinion of the court of appeals in all other respects. See *id.* (citing IND. APP. R. 11(B)(3) (repealed Jan. 1, 2001)).

312. 707 N.E.2d 998 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 302 (Ind. 1999).

313. See *id.* at 999.

314. See *id.*

315. See IND. TRIAL RULE 59(A)(1) and (2).



the viability of a products liability claim on the facts presented.<sup>316</sup>

The motion was denied and an appeal was taken. On appeal, in addition to the two issues raised in the motion to correct error, the appellant raised a third issue—the validity of the release.<sup>317</sup> The appellee argued that because the third issue was not included in the motion to correct error, it was waived.<sup>318</sup> Relying on the plain language of Trial Rule 59, the court of appeals found no waiver and addressed all the issues on the merits.<sup>319</sup> As the appellate court noted, the rule states that issues other than those required to be raised in a motion to correct error may be “initially addressed in the appellate brief” so long as they were “appropriately preserved during the trial.”<sup>320</sup>

#### *R. Statutory Motion to Correct Erroneous Sentence Is a PCR Petition*

*Waters v. State*<sup>321</sup> provides important procedural guidance in the area of successive criminal post-conviction relief proceedings. In addition to the direct appeal afforded to those convicted of crimes, Indiana also permits such persons to collaterally attack their convictions through a petition seeking post-conviction relief (PCR).<sup>322</sup> A convicted person has the right to file one PCR in the court where the conviction took place.<sup>323</sup> However, effective January 1, 1994, a convicted person who already sought post-conviction relief once cannot file another PCR without obtaining leave from the appellate court of appropriate jurisdiction.<sup>324</sup>

The Indiana General Assembly has also separately authorized a statutory proceeding whereby a convicted criminal can file in the court of conviction a motion asking that an allegedly “erroneous sentence” be corrected.<sup>325</sup> Generally, such a motion might be appropriate where the sentence imposed is erroneous on its face, such as a sentence that is in excess of that authorized by statute.<sup>326</sup>

Alex Waters had been convicted of various drug-related offenses and his convictions had been affirmed on appeal. He sought and was denied post-conviction relief, a decision that was also affirmed on appeal. As provided in the PCR rules noted above, Waters then sought leave of the court of appeals to file

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316. See *Marsh*, 707 N.E.2d at 1000.

317. See *id.*

318. See *id.*

319. See *id.*

320. *Id.* (quoting IND. TRIAL RULE 59(A)(1) and (2)).

321. 703 N.E.2d 688 (Ind. Ct. App. 1998).

322. See INDIANA POST-CONVICTION RULE 1 § 2.

323. See *id.*

324. See *id.* All PCR appeals and petitions seeking leave to file a successive PCR are filed with the court of appeals except where a sentence of death has been imposed. See APPELLATE RULE 4(A)(1)(a), 5(A).

325. IND. CODE § 35-38-1-15 (1999).

326. See, e.g., *Lockhart v. State*, 671 N.E.2d 893, 904-05 (Ind. Ct. App. 1996).



a successive PCR, which was denied.<sup>327</sup>

Undaunted, Waters then filed a motion in the trial court requesting that his allegedly erroneous sentence be corrected. The trial court addressed the motion on the merits, but denied it.<sup>328</sup> On appeal of that denial, the court of appeals remanded with instruction to dismiss, rather than deny, the motion.<sup>329</sup> The court of appeals noted that a motion to correct an erroneous sentence is, in effect, just another form of a request for post-conviction relief.<sup>330</sup> Accordingly, a convicted person who has already sought and been denied post-conviction relief once must seek leave of the appellate court before being allowed to file a motion to correct erroneous sentence.<sup>331</sup> In Waters' particular circumstance, he had already unsuccessfully sought leave to file a successive PCR.<sup>332</sup> Therefore, the trial court was without jurisdiction to do anything but dismiss his motion.<sup>333</sup>

### *S. Recovering Appellate Attorney Fees*

Under Indiana law, the trial court in a dissolution proceeding "may order a party to pay a reasonable amount" of the other party's legal fees.<sup>334</sup> A 1985 opinion of the court of appeals, *Hudson v. Hudson*,<sup>335</sup> held that the trial court lacked jurisdiction to enter an award for attorney fees after the record of proceedings had been filed.<sup>336</sup> The court in *Hudson* reasoned, in essence, that a trial court is divested of jurisdiction once an appeal is perfected.<sup>337</sup> It therefore reversed the trial court order entered after the record of proceedings had been filed that awarded attorney fees in a dissolution proceeding.<sup>338</sup>

At least two subsequent opinions of the court of appeals have declined to follow *Hudson*.<sup>339</sup> During the survey period, a third opinion in disagreement with

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327. See *Waters v. State*, 703 N.E.2d 688 (Ind. Ct. App. 1998).

328. See *id.*

329. See *id.*

330. See *id.* at 689 (citing *State ex rel. Gordon v. Vanderburgh Circuit Court*, 616 N.E.2d 8 (Ind. 1993)).

331. See *id.*

332. See *id.* at 688.

333. See *id.* at 689.

334. IND. CODE § 31-15-10-1 (1999).

335. 484 N.E.2d 579 (Ind. Ct. App. 1985).

336. See *id.* at 583.

337. See *id.*

338. See *id.* We note that the attorney fee statute cited in *Hudson*, Indiana Code section 31-1-11.5-16, was a predecessor to the current statute, Indiana Code section 31-15-10-1.

339. See *Wagner v. Wagner*, 491 N.E.2d 549, 555 (Ind. Ct. App. 1986) ("Because the award of appellate attorney's fees is separate and distinct from the issues on appeal, the perfection of the appeal does not deprive the trial court of jurisdiction to make such an award."); *Scheetz v. Scheetz*, 509 N.E.2d 840, 848-49 (Ind. Ct. App. 1987) (declining to follow *Hudson* and finding *Wagner* "more convincing").



*Hudson* was issued. In *Pierce v. Pierce*,<sup>340</sup> the court of appeals stated what now appears to be the prevailing view. "[T]he trial court retains jurisdiction even after perfection of an appeal to make an award of appellate attorney fees and in what amount."<sup>341</sup> Although the Indiana Supreme Court was presented with the opportunity to address the conflict between the more recent cases and *Hudson*, it declined to do so in the *Pierce* case.<sup>342</sup>

The court of appeals also considered what effect a release of judgment had on a pending request for appellate attorney fees. In *RJH of Florida, Inc. v. Summit Account & Computer Services, Inc.*,<sup>343</sup> the plaintiff obtained a judgment of approximately \$95,000 in the trial court, which included \$10,000 in attorney fees awarded pursuant to former Indiana Code section 34-4-30-1.<sup>344</sup> After the court of appeals affirmed on appeal, the plaintiff filed a petition in the trial court seeking appellate attorney fees and costs.<sup>345</sup> Before the trial court ruled on the petition, the plaintiff filed a release of judgment, apparently based on the defendant's payment of the underlying judgment.<sup>346</sup> The defendant then argued that the release of judgment terminated the litigation, foreclosing the plaintiff's right to the requested appellate attorney fees.<sup>347</sup> The trial court agreed, but the court of appeals reversed.<sup>348</sup>

The court of appeals first noted that the release of judgment was not a result of any agreement between the parties, but was filed pursuant to Trial Rule 67(B), which refers to statements of "total or partial satisfaction."<sup>349</sup> The court concluded that when a statement of satisfaction applies to only part of a judgment, further proceedings with respect to unsatisfied claims are not barred.<sup>350</sup>

The release of judgment was ambiguous because it did not expressly state whether it was in full or only partial satisfaction of plaintiff's claims.<sup>351</sup> The court of appeals therefore turned to the circumstances surrounding the release of judgment to determine the plaintiff's intent.<sup>352</sup> The court concluded that since the plaintiff had diligently pursued its request for appellate attorney fees, it was

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340. 702 N.E.2d 765, 769 (Ind. Ct. App. 1998), *trans. denied*, 726 N.E.2d 300 (Ind. 1999) (unpublished table decision).

341. *Id.* (citing *Wagner*, 491 N.E.2d at 555).

342. *See Pierce*, 726 N.E.2d at 300.

343. 725 N.E.2d 972 (Ind. Ct. App. 2000).

344. *See id.* at 973. The statute, now recodified at Indiana Code section 34-24-3-1, permits persons who suffer a pecuniary loss as a result of certain criminal violations to recover, among other things, a reasonable attorney fee.

345. *See id.*

346. *See id.*

347. *See id.*

348. *See id.*

349. *Id.* at 974 (quoting IND. TRIAL RULE 67(B)).

350. *Id.*

351. *See id.*

352. *See id.*



unlikely that it intended to release this claim in the release of judgment.<sup>353</sup> Rather, the release was limited to the initial award and was filed so the plaintiff could obtain the award, which could not be affected by the pending appellate-fee petition, from the trial court clerk.<sup>354</sup> Thus, the release did not bar recovery of appellate attorney fees.<sup>355</sup>

*T. Attorney Held Personally Responsible for Payment of Court Reporter Fees*

The court of appeals' opinion in *Boesch v. Marilyn M. Jones & Associates*<sup>356</sup> should be welcomed news to court reporters. In this case, court reporter Jones provided reporting services at a deposition at the request of attorney Boesch. Jones sent her initial bill and subsequent requests for payment to Boesch, who forwarded them to his client. The client had agreed to pay the expenses of the litigation. Ultimately, the client paid neither Boesch nor Jones. When Boesch refused to pay Jones for her reporting services, she brought suit.<sup>357</sup> The trial court entered judgment in her favor and Boesch appealed.<sup>358</sup>

The court of appeals affirmed.<sup>359</sup> It rejected Boesch's argument that he was merely an agent for the client, and that the agent should not be held liable for expenses incurred by the principal.<sup>360</sup> In a case of first impression in Indiana, the court of appeals held that absent a disclaimer of responsibility of which the court reporter is aware, the attorney who requests court reporting services is responsible for paying for them.<sup>361</sup> Although the case involved reporting services provided in connection with a deposition, the same rule would seem to apply as between trial court reporters and appellate practitioners.

*U. How to Write an Unpersuasive Brief*

The Indiana Supreme took umbrage with an attack on the integrity of the court of appeals in *Michigan Mutual Insurance Co. v. Sports, Inc.*<sup>362</sup> After the court of appeals issued its opinion, the appellant petitioned for transfer to the supreme court. In its brief in support of transfer, the appellant asserted that the opinion of the court of appeals was "so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that

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353. *See id.*

354. *See id.* at 975.

355. *See id.* at 974-75.

356. 712 N.E.2d 1061 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 313 (Ind. 1999).

357. *See id.* at 1062.

358. *See id.*

359. *See id.* at 1063.

360. *See id.*

361. *See id.*

362. 706 N.E.2d 555 (Ind. 1999) (*per curiam*). The opinion of the court of appeals is reported at 698 N.E.2d 834 (Ind. Ct. App. 1998).



conclusion (regardless of whether the facts or the law supported its decision).<sup>363</sup> The supreme court denied transfer, but issued a *per curiam* opinion chastising counsel for the statement and striking the brief.<sup>364</sup>

During the survey period, a few other attorneys similarly lost their professional bearings in petitions for rehearing following the issuance of court of appeals' opinions. In one instance, the court of appeals had to caution counsel that it was not persuasive to refer to its opinion as "incomprehensible."<sup>365</sup> The court of appeals was likewise not impressed with having its opinion referred to as a "bad lawyer joke."<sup>366</sup>

The judicial system in general was asserted to be an "unwitting accomplice" to the "evil purpose" of another party by the appellant in *Pitman v. Pitman*.<sup>367</sup> The court of appeals was not convinced and struck various passages from the appellant's brief.<sup>368</sup>

Unpersuasive argumentation style was not limited to unwise salvos aimed at the judiciary. In one opinion issued during the survey period, the court of appeals was required to point out to the appellee that its "hyperbolic barbs" aimed at opposing counsel were, to put it lightly, uninformative.<sup>369</sup> After citing various examples of the appellee's "petulant grouching," the court reminded counsel: "A brief is far more helpful to this court, and it advocates far more effectively for the client, when its focus is on the case before the court and not on counsel's opponent."<sup>370</sup> The court of appeals was similarly unimpressed with the lack of collegiality and "name-calling" directed at opposing counsel by the appellee in another case published during the reporting period.<sup>371</sup> The court stated that the comments of counsel added "no merit" to the arguments and demonstrated "a lack of professionalism."<sup>372</sup>

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363. *Mutual Ins.*, 706 N.E.2d at 555 (quoting Appellant's brief).

364. *See id.* ("As a scurrilous and intemperate attack on the integrity of the Court of Appeals, this sentence is unacceptable, and the Brief in Support of Appellant's Petition to Transfer is hereby stricken.").

365. *Bloomington Hosp. v. Stofko*, 709 N.E.2d 1078, 1079 n.1 (Ind. Ct. App. 1999).

366. *B & L Appliances & Servs., Inc. v. McFerran*, 712 N.E.2d 1033, 1037 (Ind. Ct. App. 1999).

367. 717 N.E.2d 627, 634 (Ind. Ct. App. 1999) (quoting Appellant's brief).

368. *See id.* at 634.

369. *See County Line Towing, Inc. v. Cincinnati Ins. Co.*, 714 N.E.2d 285, 290-91 (Ind. Ct. App. 1999) (quoting *Amax Coal Co. v. Adams*, 597 N.E.2d 350, 352 (Ind. Ct. App. 1992), *trans. denied*, 735 N.E.2d 219 (Ind. 2000)).

370. *Id.*

371. *Mid-Continent Paper Converters, Inc. v. Brady, Ware & Schoenfeld, Inc.*, 715 N.E.2d 906, 911 n.5 (Ind. Ct. App. 1999).

372. *Id.*



### V. Other Potential Briefing Pitfalls

While the case law is replete with admonitions about briefs that are defective or that vary from the rules in some significant manner, a few cases from the survey period merit mentioning. Care should always be taken when stating the facts pertinent to an appeal. In a few cases, counsel were chastised for argumentative statements of the facts.<sup>373</sup> In at least two cases, counsel were admonished for misrepresenting or creating false impressions about the facts of record.<sup>374</sup>

In *Hotmix & Bituminous Equipment Inc. v. Hardrock Equipment Corp.*,<sup>375</sup> the appellant contended that a case on which the trial court had relied was wrongly decided.<sup>376</sup> In support, the appellant only quoted from "Indiana Practice, Rules of Procedure Annotated," by Professor William F. Harvey.<sup>377</sup> This was insufficient development of the argument for the court of appeals, which held that the appellant waived review of this issue.<sup>378</sup> Thus it appears that for at least some members of the court of appeals, more than quotation of supporting scholarly opinion is necessary to avoid waiver of an argument on appeal.

Although appellate courts generally appreciate brevity, counsel should not take the maxim "less is more" to an extreme. In one civil case, the appellant's statement of facts consisted of two sentences.<sup>379</sup> The court of appeals counseled that

[b]riefs should be prepared so that each judge, considering the brief alone and independent of the record, can intelligently consider and decide each issue presented. The brief must be prepared so that all questions can be determined from an examination of the brief alone because there is only one record to be shared among all the judges.<sup>380</sup>

In another case, the appellees chose not to brief an issue raised by the appellants because appellees believed that the court did not need to address the issue to resolve the case.<sup>381</sup> The court responded:

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373. See, e.g., *Pitman v. Pitman*, 717 N.E.2d 627, 630 n.1 (Ind. Ct. App. 1999); *Wright v. Elston*, 701 N.E.2d 1227, 1230 (Ind. Ct. App. 1998).

374. See, e.g., *Halbe v. Weinberg*, 717 N.E.2d 876, 880 n.7 (Ind. 1999); *Adams v. State*, 726 N.E.2d 390, 392 n.3 (Ind. Ct. App. 2000), *reh'g denied, modified*, No. 45D01-9204-CT-452, 2000 Ind. LEXIS 2, at \*1 (Ind. Jan., 7, 2000), *trans. granted*, (Order Nov. 3, 2000), *opinion pending*. The opinion of the court of appeals in *Adams* has been vacated and has no precedential value, but the admonition of counsel is nevertheless noteworthy.

375. 719 N.E.2d 824 (Ind. Ct. App. 1999).

376. See *id.* at 828-29.

377. See *id.* at 829 n.3.

378. See *id.*

379. See *Ling v. Stillwell*, 732 N.E.2d 1270, 1272 n.2 (Ind. Ct. App. 2000), *trans. denied*, No. 49A02-0002-CV-119, 2001 Ind. LEXIS (Ind. Jan. 17, 2001).

380. *Id.* (quoting *Paulson v. Centier Bank*, 704 N.E.2d 482, 486 n.2 (Ind. Ct. App. 1998).

381. See *Turner v. City of Evansville*, 729 N.E.2d 149 (Ind. Ct. App. 2000), *vacated*, 740



We appreciate the [appellees'] attempts at brevity; however, we are in the best position to determine what issues need to be discussed in order to resolve a given case. . . . Should we decide that an issue to which the appellee has not responded is necessary for resolution of a case, the failure to respond would lessen the appellant's burden of showing error.<sup>382</sup>

In yet another case, the court of appeals deemed some arguments waived when the only support the appellant offered was attempted incorporation by reference of materials filed in the trial court.<sup>383</sup>

Finally, in three criminal appeals coming before the Indiana Supreme Court during the survey period, the court was so dissatisfied with the quality of the briefing of appointed appellate counsel that it issued orders directing that the appeal be rebriefed by a different attorney.<sup>384</sup>

#### *W. Appellate Attorney Shortcomings Warranted Disciplinary Action*

In two cases, formal disciplinary action for the mishandling of an appeal was warranted. In *In re McCord*,<sup>385</sup> the Indiana Supreme Court suspended the respondent from the practice of law for not less than sixty days based on his mishandling of an appeal he took to the Seventh Circuit.<sup>386</sup> His deficiencies included: failing to become admitted to practice before the Seventh Circuit; filing an appellant's brief that was late and contained irregularities; failing to correct these irregularities in his first two attempts; and making substantive changes in the brief on his third attempt to correct the brief (in violation of applicable rules and admonishments in the court's deficiency notices) resulting in the court striking the brief and dismissing the appeal.<sup>387</sup> The court held that the respondent had violated several provisions of the Rules of Professional Conduct, principally Professional Conduct Rule 1.1, which requires that a lawyer provide competent representation to clients.<sup>388</sup>

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N.E.2d 860 (Ind. 2001).

382. *Id.* at 156 n.2.

383. See *Bigler v. State*, 732 N.E.2d 191, 196-97 (Ind. Ct. App. 2000), *trans. denied*, No. 84A05-9904-PC-192, 2000 Ind. LEXIS 907, at \*1 (Ind. Sept. 14, 2000).

384. See *Perez v. State*, No. 12S00-9910-CR-663, order (Ind. Apr. 28, 2000), *appeal pending*; *Bishop v. State*, No. 49S00-9910-CR-621, order (Ind. Apr. 6, 2000), *redocketed to court of proper jurisdiction as Cause No. 49A02-0004-CR-223* (conviction and sentence ultimately affirmed); *Price v. State*, No. 49S00-9802-CR-84, order (Ind. Oct. 19, 1998) (conviction and sentence ultimately affirmed). For a more complete discussion of mandated rebriefing, see Douglas E. Cressler, *Mandated Rebriefing: A Judicial Mechanism for Enforcing Quality Control in Criminal Appeals*, RES GESTAE, July 2000, at 20.

385. 722 N.E.2d 820 (Ind. 2000).

386. See *id.* at 824.

387. See *id.* at 822-23.

388. See *id.* at 824.



In *In re Thonert*,<sup>389</sup> the Indiana Supreme Court gave a public reprimand and admonishment to an attorney for failure to disclose controlling authority to an appellate tribunal (which was known to him and not disclosed by opposing counsel), and for failure to advise his client of the adverse authority.<sup>390</sup> For a fee of \$5000, the attorney agreed to represent a client who had pled guilty to operating a motor vehicle while intoxicated.<sup>391</sup> On appeal, the attorney argued that the client should be allowed to withdraw his guilty plea.<sup>392</sup> The attorney advised the client of a 1989 court of appeals decision that was favorable to the client's position, but did not disclose to the client or to the court of appeals a 1995 supreme court opinion that was unfavorable.<sup>393</sup> Moreover, the attorney had to have known about the supreme court case because he represented the losing party in that case.<sup>394</sup>

The supreme court found that the attorney's failure to disclose controlling adverse authority to the court of appeals violated Professional Conduct Rule 3.3(a)(3).<sup>395</sup> The court found that the attorney's conduct also violated Professional Conduct Rule 1.4(b), which requires a lawyer to explain a matter to the extent necessary to permit a client to make informed decisions regarding representation.<sup>396</sup> The attorney here had "effectively divested his client of the opportunity to assess intelligently the legal environment in which his case would be argued and to make informed decisions regarding whether to go forward with it."<sup>397</sup>

### *X. Praise for Appellate Attorney Excellence*

While the appellate courts occasionally pointed out appellate shortcomings, the courts also expressed public praise for appellate excellence. In several opinions handed down during the survey period, the appellate courts paused to note excellent legal work on appeal.<sup>398</sup> The court was more specific in its praise

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389. 733 N.E.2d 932 (Ind. 2000).

390. *See id.* at 934.

391. *See id.* at 933.

392. *See id.*

393. *See id.*

394. *See id.* at 933-43.

395. *See id.* at 934.

396. *See id.*

397. *Id.*

398. *See, e.g.,* *Coffer v. Arndt*, 732 N.E.2d 815, 818 n.1 (Ind. Ct. App. 2000), *reh'g denied*, No. 49A02-9910-CV-720, 2000 Ind. App. LEXIS 1773, at \*1 (Ind. Ct. App. Oct. 2, 2000); *Clemens v. Wishard Mem'l Hosp.*, 727 N.E.2d 1084, 1085 n.3 (Ind. Ct. App. 2000), *trans. denied*, No. 93A02-9910-EX-714, 2000 Ind., LEXIS 1039, at \*1 (Ind. Oct. 18, 2000); *Brickner v. Brickner*, 723 N.E.2d 468, 469 n.1 (Ind. Ct. App. 2000), *trans. denied*, 735 N.E.2d 235 (unpublished table decision); *Franklin v. Benock*, 722 N.E.2d 874, 876 n.1 (Ind. Ct. App. 2000), *trans. denied*, No. 42A04-9902-CV-83, 2000 Ind. LEXIS 832, at \*1 (Ind. Aug. 15, 2000); *Gallant Ins. Co. v. Wilkerson*, 720 N.E.2d 1223, 1225 n.2 (Ind. Ct. App. 1999); *Owens Corning Fiberglas Corp. v.*



in *Moore v. State*,<sup>399</sup> noting that at oral argument, appellant's counsel "was clearly passionate about his client and the issues presented," and expressing appreciation for "his candor during argument, never intending to mislead the court in any way and stating that he would not answer if he was not positive about certain facts or law."<sup>400</sup> In other cases, the court commended counsel for the "intelligent strategic decision" of "winnowing out weaker arguments on appeal and focusing on" stronger issues,<sup>401</sup> and expressed appreciation for an appellee's candor in conceding an issue the appellant had raised.<sup>402</sup>

### Y. *Miscellanies of Note*

The longest opinion issued during the survey period was *Community Care Centers, Inc. v. FSSA*,<sup>403</sup> weighing in at a hefty 21,536 words. The court of appeals' opinion in *State v. Friedel*<sup>404</sup> is remarkable in that thirty-seven percent of the total word-count in the opinion consists of footnotes. Without giving any credit to Euclid (circa 300 B.C.), the court of appeals in *Gronceski v. Long Beach Board of Zoning Appeals*<sup>405</sup> judicially determined how to calculate the area of a circle given only its perimeter length.<sup>406</sup> Finally, of interest to sports fans is *Wright v. Spinks*,<sup>407</sup> wherein the court of appeals took judicial notice that a "mulligan" is a replacement golf shot.<sup>408</sup>

While the court of appeals generally "uses extreme restraint" in awarding attorney fees under former Appellate Rule 15(G) (now Appellate Rule 66(E)),<sup>409</sup> appellants in two back-to-back cases advanced arguments so lacking in merit that the same court of appeals panel awarded appellate attorney fees to the appellees, with one award imposed *sua sponte*.<sup>410</sup>

The two-year survey period also included examples of infrequently used

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Cobb, 714 N.E.2d 295, 297 n.1 (Ind. Ct. App. 1999), *trans. granted, vacated by* 735 N.E.2d 219 (Ind. 2000).

399. 723 N.E.2d 442 (Ind. Ct. App. 2000).

400. *Id.* at 444 n.2.

401. *Rouster v. State*, 705 N.E.2d 999, 1004 n.2 (Ind. 1999), *cert. denied*, *Williams v. Indiana*, 120 S. Ct. 1970 (2000).

402. *See Cole v. Lantis Corp.*, 714 N.E.2d 194, 197 n.2 (Ind. Ct. App. 1999).

403. 716 N.E.2d 519 (Ind. Ct. App. 1999), *trans. denied sub nom. Comty. Care Ctrs., Inc. v. Tioga Pines Living Ctr.*, 735 N.E.2d 229 (Ind. 2000) (unpublished table decision).

404. 714 N.E.2d 1231 (Ind. Ct. App. 1999).

405. 721 N.E.2d 359 (Ind. Ct. App. 1999).

406. *See id.* at 364 n.11.

407. 722 N.E.2d 1278 (Ind. Ct. App.), *trans. denied*, 735 N.E.2d 239 (Ind. 2000).

408. *Id.* at 1279-80.

409. *Scott v. Randle*, 697 N.E.2d 60, 69-70 (Ind. Ct. App. 1998).

410. *See Geico Ins. Co. v. Rowell*, 705 N.E.2d 476, 483 (Ind. Ct. App. 1999), *reh'g denied*, No. 45A03-9806-CV-253, 1999 Ind. App. LEXIS 2381 (Ind. Ct. App. Feb. 18, 1999); *Garza v. Lorch*, 705 N.E.2d 468, 475 (Ind. Ct. App. 1998).



supreme court authority, including two direct civil appeals,<sup>411</sup> four grants of transfer because of the emergency nature of the proceedings,<sup>412</sup> and three denials of transfer after transfer had already been granted, thus resuscitating court of appeals' opinions that had been vacated.<sup>413</sup>

Finally, it may not be a matter of common knowledge but the voting of the members of the Indiana Supreme Court on petitions to transfer is a matter of public record easily accessible to practitioners. For the past three years, West Publishing has published tables semiannually in the advance sheets and bound volumes of the *Northeastern Reporter* that record the voting on every transfer decision made during the reporting period.<sup>414</sup>

### CONCLUSION

As noted at the beginning of this Article, this survey period was one of the most eventful from the standpoint of appellate practice. January 1, 2001, marked the effective date of both a new set of Rules of Appellate Procedure and a rule amendment implementing a constitutional change in supreme court jurisdiction. The revised rules promise to clarify, modernize, and streamline appellate practice, as soon as practitioners and others involved in the process master the new system. The jurisdictional change will greatly increase the supreme court's control over its docket, giving it more discretion to address issues that might otherwise have been crowded out by its former mandatory criminal direct review jurisdiction.

The jurisdictional shift will only slightly increase the workload of the court of appeals, but general growth trends point toward a potential need to begin consideration of the addition of a new panel to the court of appeals.

Rule and jurisdictional changes were not the only significant developments during the survey period. Several opinions issued during the time frame covered

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411. See *Van Dusen v. Stotts*, 712 N.E.2d 491 (Ind. 1999); *Baldwin v. Reagan*, 715 N.E.2d 332 (Ind. 1999) (Pursuant to former Appellate Rule 4(A)(8), now Indiana Appellate Rule 4(A)(1)(b), civil appeals wherein a state or federal statute is declared unconstitutional are taken directly to the Indiana Supreme Court).

412. *State v. Costa*, 732 N.E.2d 1224 (Ind. 2000); *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151 (Ind. 1999); *Ind. Bell Tel. Co. v. Ind. Util. Regulatory Comm'n*, 715 N.E.2d 351 (Ind. 1999); *GTE Corp. v. Ind. Util. Regulatory Comm'n*, 715 N.E.2d 360 (Ind. 1999) (granting transfer in all four cases before an opinion had even been issued by the court of appeals on petitions demonstrating that the appeals involved questions of law of great public importance that should be determined quickly).

413. *Weida v. Dowden*, 726 N.E.2d 307 (Ind. 1999), *revitalizing* 664 N.E.2d 742 (Ind. Ct. App. 1996); *State v. Linck*, 716 N.E.2d 892 (Ind. 1999), *revitalizing* 708 N.E.2d 60 (Ind. Ct. App. 1999); *Jordan v. Read*, 712 N.E.2d 967 (Ind. 1999), *revitalizing* 677 N.E.2d 640 (Ind. Ct. App. 1997) (unpublished memorandum decision).

414. See, e.g., 741 N.E.2d 1247 (Table); 735 N.E.2d 219 (Table); 726 N.E.2d 297 (Table); 714 N.E.2d 163 (Table); 706 N.E.2d 165 (Table); 698 N.E.2d 1182 (Table); 690 N.E.2d 1178 (Table); 683 N.E.2d 578 (Table).



herein, including two by the U.S. Supreme Court, decided important issues relating to appellate procedure in Indiana.

The next few years should prove interesting for appellate lawyers as the courts and practitioners come to grips with an entirely new set of rules and the Indiana Supreme Court becomes a more significant player in the civil arena. A new era in appellate practice is upon us.







# RECENT DEVELOPMENTS IN INDIANA CIVIL PROCEDURE

JOELLEN LIND\*

## INTRODUCTION

In 2000, Indiana realized two long term goals affecting civil practice—passage of the constitutional amendment relieving the Indiana Supreme Court from the burden of direct appeals in most criminal cases<sup>1</sup> and promulgation of the New Appellate Rules.<sup>2</sup> The change in the court's jurisdiction will enable it more effectively to supervise pleading and practice in Indiana's courts as its docket is freed for civil matters. The New Appellate Rules—effective in all appeals taken on or after January 1, 2000—clarify and modernize appellate practice on the model of the federal rules, making appeals in civil cases more efficient and less costly.

Aside from these developments, the Indiana Supreme Court's decisions affecting civil procedure were significant. It issued important opinions on personal jurisdiction, exhaustion of administrative remedies, the further implications of *Martin v. Richey*,<sup>3</sup> summary judgment, and the nonparty defense, among others. The supreme court has also promulgated new rules affecting its original jurisdiction,<sup>4</sup> alternative dispute resolution,<sup>5</sup> and court administration,<sup>6</sup> among other topics. The Indiana Supreme Court also released proposed amendments to the Trial Rules, Rules for Administrative Proceedings, and Small Claims Court Rules for public comment.<sup>7</sup> These pending matters, as well as the pilot project for a specialized family court and the "Juries for the 21st Century Project," portend further changes in Indiana civil practice.<sup>8</sup>

Decisions emanating from the court of appeals touched on a range of procedural questions from default to venue, and showed the appellate courts grappling with the standards for motions to dismiss and motions for summary judgment, among other recurring issues. In one notable opinion, *Sims v. United States Fidelity & Guaranty Co.*,<sup>9</sup> the court of appeals invalidated section 22-3-4-

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1. See IND. CONST. art. VII, § 4 (amended 2000).

2. See Order Amending Rules of Appellate Procedure, Ind. Order No. 2000-26 (2000).

3. 711 N.E.2d 1273 (Ind. 1999). *Martin* invalidated on constitutional grounds the Medical Malpractice statute of limitations when applied to plaintiffs who could not have discovered alleged malpractice prior to the expiration of the time limit specified in the statute.

4. See Order Amending Indiana Rules of Procedure for Original Actions, Ind. Order No. 2000-24 (2000).

5. See Order Amending Rules for Alternative Dispute Resolution, Ind. Order No. 2000-30 (2000).

6. See Order Amending Administrative Rules, Ind. Order No. 2000-25 (2000).

7. See *Comment Sought on Proposed Rule Amendments*, RES GESTAE, Dec. 2000, at 23.

8. Available at [http://www.ai.org/judiciary/citizen/final\\_report.pdf](http://www.ai.org/judiciary/citizen/final_report.pdf).

9. 730 N.E.2d 232 (Ind. Ct. App. 2000), *trans. granted by* No. 49502-0105-CV-229, 2001 IND. LEXIS 416, at \*1 (Ind. May 4, 2001).



12.1 of the Indiana Code (worker's compensation jurisdiction) as a violation of the Indiana Constitution's "open courts" provision and the right to jury trial.<sup>10</sup>

At the federal level, changes to the Federal Rules of Civil Procedure governing mandatory disclosures and the scope of discovery, among others things, were effectuated and the United States Supreme Court continued to issue decisions articulating the "new federalism" that further restrict the ability of Congress to legislate. The United States Court of Appeals for the Seventh Circuit decided numerous cases involving civil practice, from dismissals of actions, to determination of citizenship for diversity, to costs, and many other topics. Finally, the United States District Courts for the Northern and Southern Districts of Indiana both modified their local rules. What follows is a general survey of the high points of these developments beginning with the Indiana Supreme Court.

### I. THE INDIANA SUPREME COURT'S JURISDICTION

In the November 2000 election, Indiana voters approved a measure amending article 7, section 4 of the state constitution.<sup>11</sup> This amendment removes from the Indiana Supreme Court direct appellate jurisdiction in criminal matters other than capital cases. Prior to its adoption, changes in Indiana's mandatory sentencing laws required that numerous criminal matters be directly reviewed in the court,<sup>12</sup> rather than being subject to discretionary review.<sup>13</sup> The influx of criminal matters reduced the court's time to consider civil cases. From 1995 to 2000, the number of opinions issued by the court in direct criminal appeals increased from

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10. See *infra* text accompanying notes 157-68.

11. The amended text reads:

The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal, and retirement of justices and judges; supervision of the exercise of jurisdiction by the other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction. The Supreme Court shall exercise appellate jurisdiction under such terms and conditions as specified by rules except that appeals from a judgment imposing a sentence of death shall be taken directly to the Supreme Court. The Supreme Court shall have, in all appeals of criminal cases, the power to review all questions of law and to review and revise the sentence imposed.

IND. CONST. art. VII, § 4 (amended 2000).

12. The greatest impact came from 1995 legislation that increased the typical penalty for murder so that sentences in excess of fifty years became common. See IND. CODE § 35-50-2-3 (2000). In 1988 the state constitution had been previously amended to reserve the right of direct appeal in criminal cases to sentences of greater than fifty years. With the legislative change, the fifty-year threshold no longer functioned as an adequate gatekeeper on direct criminal appeals to the court. See Hon. Randall T. Shepard, *Equal Access to the Indiana Supreme Court Requires Amending the Indiana Constitution*, RES GESTAE, Sept. 2000, at 12.

13. See IND. APPELLATE RULE 57 (formerly IND. APP. R. 11).



thirty-eight to 106.<sup>14</sup> Correspondingly, the amount of time it could devote to civil matters decreased from two thirds to one quarter.<sup>15</sup> Now criminal appeals from a sentence of life imprisonment or a prison term of more than fifty years follow the same procedure to the Indiana Supreme Court as civil appeals.<sup>16</sup> The new constitutional amendment should have a significant long term impact on Indiana civil procedure, for it will enhance the court's ability to supervise pleading and practice as it is able to grant more petitions for transfer in civil matters.

## II. THE NEW APPELLATE RULES

Aside from changes in the jurisdiction of the Indiana Supreme Court, the most significant development affecting civil practice in Indiana was the promulgation of the New Appellate Rules, which apply to all appeals taken on or after January 1, 2001. These rules replace the piecemeal approach often obtained in Indiana with a unified system similar to the federal appellate rules. But, while the New Appellate Rules make changes, they do not fundamentally alter the principles governing appeals in Indiana. Instead, they clarify issues that were previously uncertain, modernize documentation of the record on appeal, and make explicit practices that were not codified.

## III. INDIANA SUPREME COURT DECISIONS

The Indiana Supreme Court decisions of the year 2000 impact some of the most practical, but decisive aspects of civil litigation—the geographical reach of state courts, the relationship between those courts and administrative agencies, the interplay between constitutional protections and statutes of limitations, and the termination of litigation without trial through summary judgment. In each of these areas, the court has been careful to elaborate the grounds for the conclusions it has reached to make the difficult legal and policy choices involved clear. The Indiana Supreme Court continues to be one of the most articulate tribunals in the country.

### A. *Personal Jurisdiction*

*Anthem Insurance Cos. v. Tenet Healthcare Corp.*,<sup>17</sup> is a major case involving allegations of health care fraud. It resolves a dispute in the court of appeals regarding the standard of review to apply to trial court decisions on personal jurisdiction, and it may enlarge what counts as sufficient activity to establish general jurisdiction over an out-of-state defendant in Indiana courts.

Anthem sued Tenet, a Nevada corporation with headquarters in California and the parent company of other defendants who were involved in the provision of inpatient psychiatric services. The lawsuit alleged that Tenet and its affiliates obtained improper payments from Anthem by fraudulently seeking

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14. See Shepard, *supra* note 12, at 12.

15. See *id.* at 13.

16. See IND. CONST. art. 7, § 4 (amended 2000).

17. 730 N.E.2d 1227 (Ind. 2000).



reimbursement for patients. Tenet (and others) moved to dismiss for lack of personal jurisdiction. Anthem contended that Tenet's activities involved spending substantial monies in Indiana, settling a large lawsuit with the State of Indiana, defending a lawsuit in Indiana, dealing with Indiana regulators, and holding itself out as doing business in Indiana through a Web page and other business listings. The facts also showed that Tenet executives had made more than twenty-eight business trips to Indiana to recruit, litigate, deal with real estate transactions, and engage in other functions. However, Tenet emphasized that it had no employees in Indiana, was not registered to do business in the state, owned no property located in the state and had no officers or directors living in Indiana. The trial court granted Tenet's motion and this was affirmed on appeal.<sup>18</sup> Although the court of appeals used an abuse of discretion standard in its review of the trial court's grant of Tenet's motion to dismiss,<sup>19</sup> the supreme court held that where the jurisdictional facts are not in dispute, a *de novo* standard of review is required, because jurisdictional questions on agreed facts raise issues of law.<sup>20</sup>

The Indiana Supreme Court began its review with a discussion of Trial Rule 4.4(A), which it characterized as "Indiana's equivalent of a long-arm statute."<sup>21</sup> The supreme court disapproved those court of appeals' opinions that interpreted Rule 4.4(A) as extending personal jurisdiction to the extent consistent with the U.S. Constitution, underlining that T.R. 4.4(A) is an "enumerated act" statute.<sup>22</sup> Such a statute requires a determination of whether an out-of-state defendant's behavior fits within one of the acts it describes before a due process analysis is appropriate.<sup>23</sup> Only if T.R.4.4(A) is satisfied should a court inquire whether jurisdiction comports with the Federal Due Process requirements of the Fourteenth Amendment,<sup>24</sup> under the criteria developed in *International Shoe Co. v. Washington*<sup>25</sup> and its progeny. In reviewing the *Shoe* framework, the court followed the distinction between "general" (claims unrelated to contacts with the

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18. *See id.* at 1230-31, 1240.

19. *See id.* at 1237.

20. *See id.*

21. *Id.* at 1231.

22. *Id.* at 1232.

23. *See id.* at 1231-33.

24. U.S. CONST. amend XIV, § 1.

25. 326 U.S. 310 (1945). Under *Shoe* and related decisions, a two-part inquiry is appropriate: first, whether the defendant's activities constitute minimum contacts (whether "the defendant could reasonably anticipate being haled into court there") and second, whether exertion of jurisdiction would be too unfair to comport with due process under the totality of circumstances ("whether 'traditional notions of fair play and substantial justice'" would be offended.). *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). The latter inquiry constitutes a balancing test between these factors: the burden on the defendant, the forum state's interest in the litigation, the plaintiff's interest in convenient and effective relief, the interstate judicial system's interest in efficiency, and the states' shared interest in furthering social policies. *See Anthem Ins. Cos.*, 730 N.E.2d at 1236.



forum) and “specific” jurisdiction (claims related to contacts with the forum)<sup>26</sup> and reversed the court of appeals’ determination that Indiana had no power over Tenet. In so doing, it enlarged the definition of conduct giving rise to general jurisdiction.

The court advanced the analysis by stating that although the different types of activities a defendant conducts in Indiana might not be enough standing alone for general jurisdiction, those activities can be accumulated into “groups of contacts.”<sup>27</sup> Thus, even though Tenet “does not meet traditional bases for establishing general personal jurisdiction, such as office or property in Indiana, its contacts with Indiana are nonetheless ‘continuous and systematic.’”<sup>28</sup> Because the court aggregated activities that alone have not traditionally been associated with general jurisdiction, it signaled its willingness to test the boundaries of the doctrine as established by the U.S. Supreme Court in *Helicopteros Nacionales de Colombia, S.A. v. Hall*.<sup>29</sup> The Indiana Supreme Court also stated an asymmetrical rule for a defendant’s post-event contacts and a finding of jurisdiction: “Nonresident defendants cannot defeat personal jurisdiction by severing all contact with the forum state . . . [h]owever, they can tip the balance of factors toward personal jurisdiction by expanding their contact with the forum after the [alleged bad act].”<sup>30</sup>

Finally, the court conducted the analysis required by the fairness tier of due process and concluded that it was not unfair to have jurisdiction over Tenet in Indiana due to the number of the defendant’s contacts with Indiana, Tenet’s size, and the fact that it already had defended a lawsuit in the state.<sup>31</sup> The court also gave weight to the consideration that no other state would likely have jurisdiction over all defendants; thus, Indiana provided an efficient forum that advanced the interests of the judicial system as a whole.<sup>32</sup> The decision in *Anthem* abrogates *Torborg v. Fort Wayne Cardiology, Inc.*<sup>33</sup> and *Ryan v. Chayes Virginia, Inc.*<sup>34</sup>

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26. “General jurisdiction” means that a defendant’s activities are so systematic and continuous that it can be sued in the forum state on any claim—related or unrelated to those activities; in contrast, “specific jurisdiction” sufficient to establish minimum contacts for the first tier of due process analysis is present when the lawsuit in the forum is based on the defendant’s very contacts with the state. For an articulation of general jurisdiction, see *North Texas Steel Co. v. R.R. Donnelley & Sons Co.*, 679 N.E.2d 513, 519 (Ind. Ct. App. 1997) (cited with approval in *Anthem Ins. Cos.*, 730 N.E.2d at 1227).

27. *Anthem Ins. Cos.*, 730 N.E.2d at 1239.

28. *Id.* at 1239-40.

29. 466 U.S. 408 (1984).

30. *Anthem Ins. Cos.*, 730 N.E.2d at 1238 n.13 (quoting *Simpson v. Quality Oil Co.*, 723 F. Sup. 382, 391 n.6 (S.D. Ind. 1989)).

31. *See id.* at 1240.

32. *See id.*

33. 671 N.E.2d 947 (Ind. Ct. App. 1996) (jurisdiction over nonresident in action to secure reimbursement for medical services).

34. 553 N.E.2d 1237 (Ind. Ct. App. 1990) (fiduciary shield doctrine and jurisdiction over out-of-state corporate officers).



### *B. Exhaustion of Administrative Remedies*

In a pair of decisions involving constitutional challenges to Indiana's Health Care for the Indigent program ("HCI"), the Indiana Supreme Court vigorously enforced the requirement that administrative remedies be exhausted before subject-matter jurisdiction arises for judicial review. *State Board of Tax Commissioners v. Montgomery*<sup>35</sup> was a declaratory relief action instituted by Lake County and taxpayers seeking to have the HCI declared unconstitutional under the privileges and immunities clause<sup>36</sup> and property assessment and taxation clause<sup>37</sup> of the Indiana Constitution. Taxpayers originally challenged the HCI by writing a letter to the state board of tax commissioners ("state board"), which requested, among other things, a refund of monies allegedly overpaid. The chairman of the board responded that it was a ministerial entity with no power to either adjust the HCI tax levy or order a refund.<sup>38</sup> The taxpayers then brought suit in the Indiana Tax Court against the state board and argued that jurisdiction was proper because the chairman's letter was a "final determination."<sup>39</sup> The state board responded that the tax court was without jurisdiction because the plaintiffs had not exhausted their administrative remedies by filing an objection petition<sup>40</sup> or formally seeking a refund under the procedure of the tax code.<sup>41</sup> The tax court conceded that the chairman's letter did not constitute a final determination, but the court excused taxpayers from the requirement of exhausting administrative remedies because the remedies were inadequate.<sup>42</sup> This allowed taxpayers to invoke jurisdiction in the tax court, rather than to reach it on appeal. The questions involved were certified to the Indiana Supreme Court.<sup>43</sup>

In *State v. Sproles*,<sup>44</sup> the Indiana Supreme Court had held that a taxpayer could not challenge the constitutionality of a tax directly by judicial review "even if the administrative agency . . . is without the power to grant the exact remedy

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35. 730 N.E.2d 680 (Ind. 2000).

36. IND. CONST. art. I, § 23.

37. IND. CONST. art. X, § 1. "The General Assembly shall provide . . . for a uniform and equal rate of property assessment." *Id.*

38. *See Montgomery*, 730 N.E.2d at 682.

39. *Id.* at 682.

40. *See* IND. CODE § 6-1.1-17-5(b) (2000).

41. *Id.* § 6-1.1-26-1.

42. *See Montgomery*, 730 N.E.2d at 683. The objection petition procedure requires that at least ten taxpayers join to object to a tax; the tax court concluded that a constitutional right should not depend the willingness of others to join in a procedural device. With respect to a refund, the tax court found the remedy "impractical" due to the problem of a county being required to refund monies with no clear obligation on the state's part to reimburse it. *Id.* at 683. In addition, it noted that the HCI statute makes no reference to a refund process and concluded that the legislature did not intend that the county be required to grant refunds of money sent to the state. *See id.*

43. *See id.*

44. 672 N.E.2d 1353 (Ind. 1996).



the taxpayer seeks.”<sup>45</sup> Following this precedent, the Indiana Supreme Court concluded that taxpayers had not exhausted administrative remedies because they had not formally sought a refund,<sup>46</sup> despite the absence of a statute authorizing the state board to give a refund even if it had concluded that the HCI was “illegal.”<sup>47</sup> However, formal denials of refunds are eventually reviewable in the tax court on direct appeal and the statutory refund process follows a specific procedure that includes time deadlines.<sup>48</sup> In the court’s view, requiring a claim for a refund to be presented first to the state board is “not irrational”<sup>49</sup> because it forces the dispute into a path that ultimately leads to the tax court—that is, it prevents litigation from being initiated directly in courts of general jurisdiction—and “provides for the legal infrastructure to process the case in an orderly manner, including timetables for decision.”<sup>50</sup> As the court said:

For the reasons discussed in *Sproles*, it is not irrational to require plaintiffs who wish to present such a claim to proceed through the administrative apparatus the legislature has set up to deal with tax disputes, even if the ultimate constitutional issue may be resolved only at the Tax Court stage [on appeal, not through original jurisdiction]. That requirement assures that an adequate record is developed and that nonconstitutional issues that may moot the constitutional challenge will be considered. The advantages of consolidating the litigation in a forum with expertise are retained. If the cost in time and effort imposed by this procedure is too great, the remedy lies with the General Assembly.<sup>51</sup>

In the companion case, *State v. Costa*,<sup>52</sup> seven of the plaintiffs in *Montgomery* filed an action challenging the constitutionality of the HCI tax in the Lake County Superior Court while *Montgomery* was pending.<sup>53</sup> On interlocutory appeal, the court ordered dismissal of the action following its opinion in *Montgomery*, stating that

[W]e concluded [in *Montgomery*] that a taxpayer seeking to challenge the HCI levy must file a claim for a refund . . . . This claim is then reviewable by the State Board . . . and if denied, constitutes a final determination of the State Board that is reviewable in the Tax Court. The plaintiff-taxpayers have not filed a claim for a refund . . . . Accordingly, this claim, filed as an original action in a court of general

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45. *Montgomery*, 730 N.E.2d at 684.

46. *See id.* at 684-86. The court did conclude that the objection petition procedure was not an administrative remedy that had to be exhausted, for it would require numerous pro forma objections to any property valuation. *See id.* at 684.

47. *Id.* at 685.

48. *See* IND. CODE § 6-1.1-26-1 (2000).

49. *Montgomery*, 730 N.E.2d at 686.

50. *Id.* at 685.

51. *Id.* at 686.

52. 732 N.E.2d 1224 (Ind. 2000).

53. *See id.* at 1224-25.



jurisdiction, must be dismissed.<sup>54</sup>

*Montgomery* and *Costa* teach that the court will interpret the exhaustion requirement broadly to serve policies other than complete remedial relief; as a result, it may require resort to administrative remedies that are non-obvious, or even ineffective. This has been especially true of cases touching on the appellate jurisdiction of the tax court, but this approach could be applied beyond that context. At a minimum, *Montgomery* and *Costa* show that the Indiana Supreme Court is strongly committed to the requirement of exhausting administrative remedies and that constitutional challenges to administrative action cannot easily find their way into Indiana courts on original jurisdiction.

In a recently released 2001 decision, *Turner v. City of Evansville*,<sup>55</sup> the Indiana Supreme Court cited to *Montgomery* in a new context. There, a police officer who had been disciplined brought various constitutional and statutory challenges to the City of Evansville's actions against him, but did so while his appeals were pending with the Merit Commission. Although his lawsuit challenged the Merit Commission's compliance with statutory requirements, the court reasoned that he should not have obtained an injunction against its actions.<sup>56</sup> Instead, the officer should have made his arguments to the Merit Commission itself before seeking judicial review.<sup>57</sup> As in *Montgomery*, the Court required what most probably was an ineffective remedy to be pursued to satisfy the exhaustion principle. The court's willingness to rely on *Montgomery* outside the confines of tax disputes portends that the expansive understanding developed there is applicable to other controversies.

In contrast to *Montgomery* and *Costa*, *Town Council of New Harmony v. Parker*,<sup>58</sup> a takings case, provided a more straightforward application of the doctrine of exhaustion of administrative remedies. In *Parker*, the plaintiff and property owner, Parker, brought a constitutional challenge to New Harmony's refusal to install utility services on her property. The court opined that Parker should have applied for an improvement permit and if the permit had been denied, Parker should have then appealed to the Board of Zoning Appeals.<sup>59</sup> Parker argued that an alleged moratorium on improvement permits would have been futile.<sup>60</sup> Remarking on the informality of the plaintiff's communications with the Town Council and the evidence that the zoning administrator was "pretty accommodating,"<sup>61</sup> the court did not excuse the exhaustion of administrative remedies requirement and held that trial court lacked subject matter jurisdiction to consider whether New Harmony's failure to issue permits

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54. *Id.* at 1225 (internal citations omitted).

55. 700 N.E.2d 860 (Ind. 2001).

56. *See id.* at 862.

57. *See id.*

58. 726 N.E.2d 1217 (Ind. 2000).

59. *See id.* at 1223-24.

60. *See id.* at 1224.

61. *Id.*



was an unconstitutional taking.<sup>62</sup>

### C. Martin, Van Dusen and Statutes of Limitations

In 2000, the Indiana Supreme Court continued to refine its holdings in *Martin v. Richey*<sup>63</sup> and *Van Dusen v. Stotts*.<sup>64</sup> These decisions established that the two-year statute of limitations of the Medical Malpractice Act (the "Act"),<sup>65</sup> was unconstitutional when applied to litigants who could not discover their injury prior to the running of the statute.<sup>66</sup> The *Van Dusen* court held that such plaintiffs would receive the full two years of the statute, running from the time they discover, or should have discovered, the wrong.<sup>67</sup> One of the questions left open by these cases was whether the statute of limitations is constitutional as applied to patients who discover malpractice before the expiration of the limitations period, but some time after the act giving rise to their claims. In *Boggs v. Tri-State Radiology, Inc.*,<sup>68</sup> the Indiana Supreme Court answered the question, at least with regard to a plaintiff who had discovered the true facts "well within" the two-year limitations period. In that circumstance, the court held that the Act does not violate the Indiana Constitution when it requires the action to be brought within the limitations period.<sup>69</sup>

In *Boggs*, the defendant failed to diagnose the plaintiff's wife's breast cancer when a mammogram was conducted in July 1991. Approximately one year later, the patient discovered she had metastatic cancer, which caused her death in July 1993. Plaintiff husband did not present an action for medical malpractice until July 1994. Defendant made a motion for a preliminary determination of its statute of limitations defense. The trial court granted the defendant judgment on that ground, but the appellate court reversed. The court of appeals opined that plaintiff had an opportunity to bring his claim after discovery; thus, the open courts provision, article 1, section 12,<sup>70</sup> of the state constitution was not violated. However, it did hold the statute unconstitutional as applied to the plaintiff as a violation of equal privileges and immunities.<sup>71</sup>

The Indiana Supreme Court agreed with the court of appeals' open courts analysis, but disagreed that the principle of equal privileges and immunities was violated. In its view, the plaintiff was not similarly situated with the plaintiffs in *Martin* and *Van Dusen*, and so need not be given the full two-year period after

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62. See *id.* at 1225.

63. 711 N.E.2d 1273 (Ind. 1999).

64. 712 N.E.2d 491 (Ind. 1999).

65. IND. CODE § 34-18-7-1(b) (2000).

66. See *Van Dusen*, 712 N.E.2d at 493.

67. See *id.* at 497.

68. 730 N.E.2d 692 (Ind. 2000).

69. See *id.* at 694.

70. See IND. CONST. art. 1, § 12.

71. See *Boggs*, 730 N.E.2d at 695. The requirement of equal privileges and immunities is found in the Indiana Constitution, article 1, section 23.



discovery.<sup>72</sup> It relied on *Collins v. Day*,<sup>73</sup> and noted that it had already approved a different statute of limitations for medical malpractice patients versus other tort victims.<sup>74</sup> The opinion means that plaintiffs who discover medical malpractice "well-before" the running of the limitations period but after the event itself cannot easily invoke *Martin* and *Van Dusen*.<sup>75</sup> Explaining its reasoning, the court said:

Here . . . we are not facing the practical impossibility of asserting the claim. Rather [the plaintiffs] . . . could have brought a claim within the statutory period. As long as the claim can reasonably be asserted before the statute expires, the only burden imposed upon the later discovering plaintiffs is that they have less time to make up their minds to sue. The relatively minor burden of requiring a claimant to act within the same time period from the date of occurrence, but with less time to decide to sue, is far less severe than barring the claim altogether.<sup>76</sup>

*Boggs* signals that the court will not necessarily take an expansive view of *Martin* and *Van Dusen* but neither does it establish a bright-line rule; instead it leaves open the possibility that extremely limited time periods between discovery and the running of the statute might run afoul of the constitution.<sup>77</sup> The court will consider this question on a case-by-case basis.<sup>78</sup>

Whether the logic of *Martin v. Richey* should be extended to the Products Liability Act statute of limitations was one of the major issues in *McIntosh v. Melroe Co.*<sup>79</sup> Over a spirited dissent by Justice Dickson, the court upheld the ten-year statute of limitations for products liability actions in the face of constitutional attack. The products liability statute bars actions brought more than ten years from delivery of the product to the initial user or consumer.<sup>80</sup> Plaintiffs alleged injury from a product that was sold to the initial user thirteen years prior. The trial court granted summary judgment on the basis of the ten-year time limit. The court of appeals affirmed, and the Indiana Supreme Court granted transfer.

On review, the court held that the statute was constitutional as a rational "legislative decision to limit the liability of manufacturers of goods over ten years old."<sup>81</sup> *Martin* was distinguishable because it turned on the fact that an already compensable injury could not be discovered until after the statute of limitations had run. In contrast, the provision in *McIntosh* determined in the first

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72. See *Boggs*, 730 N.E.2d at 695-96.

73. 644 N.E.2d 72 (Ind. 1994).

74. See *Boggs*, 730 N.E.2d at 696.

75. *Id.*

76. *Id.* at 697.

77. See *id.* at 697-98.

78. See *id.* at 698.

79. 729 N.E.2d 972 (Ind. 2000).

80. See IND. CODE § 34-20-3-1(b)(2) (2000).

81. See *McIntosh*, 729 N.E.2d at 973.



instance what the legislature judged to be a legally recognizable injury: "The holding in *Martin v. Richey* is that a claim that exists cannot be barred before it is knowable. Here, we are dealing with a rule of law that says . . . that products that produce no injury for ten years are no longer subject to claims under the Product Liability Act."<sup>82</sup>

The court also stated that the plaintiffs had no vested right in the common law of tort that preexisted prior to the enactment of the Products Liability Act, so that the legislature's passage of the Act did not violate the due course of law provision of the Indiana Constitution.<sup>83</sup> Finally, the majority rejected the equal privileges and immunities argument of the plaintiffs, stating that the "inherent characteristics" requirement for construing article I, section 23 established by *Collins v. Day*<sup>84</sup> applies not to the differences between the plaintiff's injured by products, but to the differences between products that are greater or lesser than ten years of age.<sup>85</sup> Because rational distinctions could be made between older and newer products, the legislature's classification was upheld.<sup>86</sup>

#### D. Summary Judgment

Recent summary judgment decisions of the Indiana Supreme Court show that the court takes seriously the requirement to carefully review decisions to ensure that the parties are not denied their day in court.<sup>87</sup> The standard of review on appeal from the grant of summary judgment is the same as it is in the trial court, i.e., de novo;<sup>88</sup> thus, the court has ample opportunity to develop principles under Trial Rule 56 that insure litigation is not prematurely curtailed. As it looks at the record on appeal, the court has insisted that all inferences drawn from the facts are to be made in favor of the nonmoving party,<sup>89</sup> and it has limited review to those materials before the trial court when making its decision.<sup>90</sup>

Within these guidelines, *Indiana University Medical Center v. Logan*<sup>91</sup> is a decision with particular impact on the procedure for summary judgment because it relaxes time limits for presenting counteraffidavits. Normally, after one party moves for summary judgment, and if the moving papers show prima facie that no genuine issue exists for trial, the nonmoving party must file competent opposition within thirty days. The nonmovant must present admissible evidence that raises a triable issue of fact.<sup>92</sup> Typically this is achieved by furnishing counteraffidavits that meet the requirements of the rules of evidence. A number of Indiana cases

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82. *Id.* at 979.

83. *See id.* at 978 (citing IND. CONST. art. I, § 12).

84. 644 N.E.2d 72 (Ind. 1994).

85. *McIntosh*, 729 N.E.2d at 981.

86. *See id.* at 981-83.

87. *See Estate of Shebel v. Yaskawa Elec. Am., Inc.*, 713 N.E.2d 275, 277 (Ind. 1999).

88. *See Shell Oil Co. v. Lovold Co.*, 705 N.E.2d 981, 983-84 (Ind. 1998).

89. *See Colonial Penn Ins. Co. v. Guzorek*, 690 N.E.2d 664, 667 (Ind. 1997).

90. *See Rosi v. Bus. Furniture Corp.*, 615 N.E.2d 431, 434 (Ind. 1993).

91. 728 N.E.2d 855 (Ind. 2000).

92. *See* IND. TRIAL RULE 56(c).



hold that a trial court may not consider responses filed after that time, and presumably, affidavits filed after that time as well.<sup>93</sup>

*Logan* involved a medical malpractice action for harms caused when defendant hospital overdosed the plaintiff's child with medication. Plaintiff timely opposed the defendant's motion for summary judgment with her own properly executed affidavit, but it alone was incompetent to contradict the allegations of the defendant's medical expert. However, she included materials that could have shown a triable issue, had they been admissible. After the thirty days for filing a response had elapsed, the plaintiff presented additional affidavits that were proper and did raise triable issues. The hospital moved to strike and for summary judgment, but the trial court denied relief. The appeals court reversed, holding that all Plaintiff's opposition materials—save her affidavit—were either inadmissible or untimely.<sup>94</sup>

The Indiana Supreme Court disagreed, construing Trial Rule 56 to give courts discretionary power to consider later filed affidavits as supplementary affidavits under Rule 56(E).<sup>95</sup> It was important to the court that the plaintiff admitted overdosing the child and had not been prejudiced by the later filings. Moreover, the late affidavits had been foreshadowed by statements in her affidavit. In a recent case, the court characterized *Logan* as giving trial courts "discretion to accept an affidavit filed later than the date specified by [Rule 56]."<sup>96</sup> *Logan* certainly advances the policy of allowing parties their day in court, but it might do so at the cost of introducing greater indeterminacy for the procedure on summary judgment.

In contrast to *Logan*, one of the more abstract questions of summary judgment is how to allocate burdens of proof and production between the parties when it is not possible to determine if a triable issue of fact exists. This problem often arises when it is difficult to know whether a defendant has manufactured a product or when intricate causal inferences must be made on limited scientific data. The U.S. Supreme Court's well-known opinion in *Celotex Corp. v. Catrett*<sup>97</sup> speaks to these situations. In *Celotex*, the Court held that with regard to an issue upon which the nonmoving party has the burden of proof, the moving party may show that no genuine issue of material fact exists for trial under FRCP 56 by pointing to the record and arguing the nonmoving party's inability to establish an element of its claim.<sup>98</sup> Under *Celotex*, the moving party does not have to affirmatively negate a claim by producing its own affidavits or similar materials.<sup>99</sup> The decision in *Celotex* has proven controversial, and its nuances are difficult to apply.

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93. See, e.g., *Markley Enters., Inc. v. Grover*, 716 N.E.2d 559, 563 (Ind. Ct. App. 1999).

94. See *Logan*, 728 N.E.2d at 857-59.

95. See *id.* at 859.

96. *Tom-Wat, Inc. v. Fink*, No. 2001 WL 29182, at \*3 (Ind. Jan. 12, 2001) (quoting *Logan*, 728 N.E.2d at 858).

97. 477 U.S. 317 (1986).

98. See *id.* at 323-24.

99. See *id.* at 322-24.



In 1994, with *Jarboe v. Landmark Community Newspapers of Indiana, Inc.*,<sup>100</sup> the Indiana Supreme Court rejected the approach of *Celotex*, stating that "Indiana's summary judgment procedure abruptly diverges from federal summary judgment practice."<sup>101</sup> That procedure requires the moving party to affirmatively negate the elements of a plaintiff's claim, before the burden shifts to the nonmoving party to demonstrate a triable issue of fact.<sup>102</sup>

*Lenhardt Tool & Die Co., Inc. v. Lumpe* raised these questions again.<sup>103</sup> *Lenhardt* involved injuries sustained by the plaintiff in an explosion at the Olin Brass plant. The explosion may have been caused by molds manufactured by Lenhardt. Because the molds were destroyed in the blast, Lenhardt argued its manufacture of them could not be established. However, Lenhardt presented no evidence in support of its motion for summary judgment to disprove it made the products. The trial court refused to require the plaintiff to come forward with evidence that the molds were manufactured by Lenhardt and denied summary judgment.<sup>104</sup> Following *Jarboe*, the Indiana Court of Appeals affirmed, and the Indiana Supreme Court denied the petition for transfer over a dissent by Justice Boehm joined by Chief Justice Shepard.<sup>105</sup> Their views suggest that at least two members of the court wish to revisit *Jarboe*.

In his dissent, Justice Boehm argued that *Jarboe* has been misunderstood and that it does not require the moving party "to establish a negative proposition."<sup>106</sup> For Justice Boehm, *Jarboe*'s rejection of *Celotex* was prompted by a concern that *Celotex* shifted the burden of production under Rule 56 to the nonmoving party, in essence confusing burdens of production with burdens of proof.<sup>107</sup> But Justice Boehm argues this is not a correct reading of *Celotex*, which really requires that the moving party support the motion for summary judgment by something beyond a conclusory statement that the plaintiff is unable to prove his claim.<sup>108</sup> Where "the undisputed facts establish that we cannot determine whose version [of the facts] is correct," Justice Boehm would allow summary judgment if the nonmovant carries the burden of proof at trial and the moving party has shown, based on the undisputed facts, that the nonmoving party cannot carry this burden.<sup>109</sup> His approach implies that the moving party could carry the burden of production by explaining with specificity why the plaintiff cannot adduce evidence on essential elements. This could be accomplished by pointing to the record in an appropriate case, so that submitting affidavits to prove a negative would not be necessary. If the explanation is persuasive, then the burden of

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100. 644 N.E.2d 118 (Ind. 1994).

101. *Id.* at 123.

102. *See id.*

103. 703 N.E.2d 1079 (Ind. Ct. App. 1998), *trans. denied*, 722 N.E.2d 824 (Ind. 2000).

104. *See id.* at 1080.

105. 722 N.E.2d at 825 (Boehm, J., dissenting).

106. *Id.* at 825.

107. *See id.*

108. *See id.* at 826.

109. *Id.* at 827-28.



production shifts to the nonmovant and he must muster evidence showing a triable issue of fact to avoid summary judgment.

Finally, in *Butler v. City of Peru*,<sup>110</sup> the Indiana Supreme Court underscored that in deciding a motion for summary judgment, all reasonable inferences to be drawn from the facts must be made in favor of the nonmoving party. In *Butler*, decedent, a maintenance worker for the Peru Community Schools, was electrocuted while trying to restore power to an outlet near the high school baseball field. Decedent's wife and his estate presented claims for negligence and product's liability against the Peru Municipal Utilities and the City of Peru, which operated the utility. The defendants countered with a motion for summary judgment. With respect to the negligence claim, they argued that because the power facilities were owned by the school, they owed decedent no duty of care.<sup>111</sup> With regard to products liability, defendants asserted that decedent was not a user or consumer within the Products Liability Act. Plaintiffs countered with evidence that, though minimal, tended to show that defendants helped to design the electrical system and had some control over it.<sup>112</sup> Nonetheless, the trial court granted defendants' motion for summary judgment.

The Indiana Supreme Court disapproved, opining that "at this summary judgment stage it is Peru's burden to foreclose the reasonable inferences raised by the Butlers' designated evidence."<sup>113</sup> Moreover, with regard to the defendants' contributory negligence defense the court stated that "[c]ontributory negligence is generally a question of fact, and, as such, is not an appropriate matter for summary judgment if there are conflicting factual inferences."<sup>114</sup> In an important point for tort law, the court also held, citing *Thiele v. Faygo Beverage, Inc.*,<sup>115</sup> that an employee may be a user or consumer for purposes of the Products Liability Act.<sup>116</sup>

### *E. Settlement and Nonparties*

With the passage of the Comparative Fault Act (the "Act") in Indiana<sup>117</sup> came the phenomenon of the nonparty affirmative defense. Under that practice, a named party may seek to attribute fault to an entity not joined in the action, rather than to himself, so that the jury may apportion fault between them on appropriate instructions.<sup>118</sup> When fault is allocated to the nonparty in this fashion, the court reduces the named party's responsibility for any damages. To claim the benefits

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110. 733 N.E.2d 912, 917 (Ind. 2000).

111. *See id.* at 916.

112. *See id.*

113. *Id.* at 915-16.

114. *Id.* at 917.

115. 489 N.E.2d 562 (Ind. Ct. App. 1986).

116. *Butler*, 733 N.E.2d at 919.

117. *See* IND. CODE § 34-51-2-1 (2000).

118. *See id.* § 34-51-2-14.



of this rule, the named party must affirmatively plead the nonparty defense.<sup>119</sup> However, under common law principles, a claimant is to have but one satisfaction for a wrong.<sup>120</sup> To avoid double recovery, amounts a plaintiff gains in settlement are typically credited against any damages that are assessed against parties who do not settle a controversy.<sup>121</sup> This occurs whether a settling entity is formally named as a party or not.<sup>122</sup> In *Mendenhall v. Skinner & Broadbent Co.*,<sup>123</sup> a case of first impression, the Indiana Supreme Court faced the question whether the Act requires changing the common law practice regarding the one satisfaction principle. If so, in actions subject the Act, the only method for reducing a damage award pursuant to another entity's settlement is to present the nonparty affirmative defense.<sup>124</sup>

In *Mendenhall*, the plaintiff Mendenhalls sued for injuries Mr. Mendenhall incurred in a slip-and-fall in a parking lot owned by the defendant Skinner and Broadbent Company. Users of the parking lot were actually patrons of Stewart Tire Co. Plaintiffs named both Skinner and Stewart as defendants, but Stewart settled with the Mendenhalls on the morning of the trial. The trial proceeded against Skinner and the jury apportioned fault, fifty percent to plaintiff Mr. Mendenhall and fifty percent to defendant Skinner. Damages were calculated at \$80,000, so Skinner's pro rata share without reference to Stewart's settlement was \$40,000. The judgment was eventually amended after motion to allow Skinner credit for the Stewart settlement amount, as well as other sums paid. These credits reduced the judgment to \$15,000. Plaintiffs appealed, and the court of appeals affirmed.<sup>125</sup>

After surveying the Comparative Fault Act, as well as the case law bearing on credit for settlement, the court concluded that it was left with a policy choice.<sup>126</sup> Skinner argued that the better policy was to prevent overcompensation, so that settlements should be credited against damages even where the nonparty defense is never raised.<sup>127</sup> The Mendenhalls stressed the risks plaintiffs take in making predictions about the amount of damages a jury might find or about how fault might be allocated.<sup>128</sup> In resolving these arguments, the court observed that when the nonparty is defense is raised by a defendant, "the jury necessarily provides the court with a visible allocation of fault" and that efforts to calculate a credit are "more speculative" when the

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119. *See id.* § 34-51-2-15.

120. *See* *Nehi Beverage Co., Inc. v. Petri*, 537 N.E.2d 78, 86 (Ind. Ct. App. 1989).

121. RESTATEMENT (SECOND) OF TORTS § 885(3) (1979) (superceded by RESTATEMENT (THIRD) OF TORTS, § 16 (2000)).

122. *See id.*

123. 728 N.E.2d 140 (Ind. 2000).

124. *See id.* at 141.

125. *See id.*

126. *See id.* at 143.

127. *See id.*

128. *See id.*



nonparty is not identified.<sup>129</sup> Following these concerns, the court required that in order to receive a reduction in damages for settlement amounts in cases under the Act, the nonparty defense must be presented: "We think the ability of courts to implement the common law policy of credit during an age of litigation under the Comparative Fault Act is best served by a rule that obliges defendants to name the settling nonparty if they are to seek a credit for the settlement."<sup>130</sup> Noting that the one satisfaction principle reduces overcompensation but can discourage settlement, the court decided that these contradictory effects are best mediated when "a thorough allocation of damages by the jury provides the court with a respectable basis upon which to adjust a judgment to avoid a double credit."<sup>131</sup>

*Mendenhall* provides clarity on a complex question with many policy implications. The majority opinion asserts that it should have a neutral effect on settlement behavior. However, as Justice Boehm noted in his concurring opinion, while the rule of *Mendenhall* penalizes those who do not name a nonparty, it may promote the involvement of entities with only marginal liability.<sup>132</sup>

#### F. Miscellaneous Issues

The Indiana Supreme Court decided other cases in 2000 covering a wide range of issues. These include:

1. *Injunctions*.—In *State v. Monfort*,<sup>133</sup> which arose from the controversy surrounding the legislature's abolition of the Jasper County Superior Court, the Indiana Supreme Court did not allow an erroneously granted injunction to be saved by grounds the appellee did not raise an appeal.<sup>134</sup> *IDEM v. Medical Disposal Services, Inc.*,<sup>135</sup> recognized that IDEM was authorized to assess civil penalties for the defendant's violation of waste permit requirements that occurred during the pendency of a preliminary injunction—later dissolved—prohibiting IDEM from interfering with the defendant's operations.<sup>136</sup>

2. *Trial Rule 53.2*.—In *State v. Cass Circuit Court*,<sup>137</sup> the court held that the running of the ninety-day period for ruling on matters taken under advisement pursuant to T.R. 53.2 is triggered by the conclusion of the submission of evidence and is not extended by additional briefing or other events.<sup>138</sup>

3. *Limitations of Action Generally*.—In *Fort Wayne International Airport*

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129. *Id.* at 144.

130. *Id.*

131. *Id.* at 145.

132. *See id.* at 145-47 (Boehm, J. dissenting.)

133. 723 N.E.2d 407 (Ind. 2000).

134. *See id.* at 408.

135. 729 N.E.2d 577 (Ind. 2000).

136. *See id.* at 580.

137. 723 N.E.2d 866 (Ind. 2000).

138. *See id.* at 869.



*v. Wilburn*,<sup>139</sup> the court held that in order to toll the running of the statute of limitations the summons, complaint, and filing fee must all be properly tendered to the clerk of the court.<sup>140</sup> *Troxel v. Troxel*<sup>141</sup> involved a probate proceeding. The Indiana Supreme Court held that when a will is improperly admitted to probate after the expiration of the statute of limitations, the court's subsequent orders are voidable, not void. Thus, although they may be attacked by a timely will contest, persons with notice of the late probate must present their objections within the five-month period for a will contest or be barred themselves.

4. *Motions "Deemed Denied" and the Final Judgment Rule.*—What is the status of a belated grant of a motion to correct errors, when the motion was "deemed denied" for purposes of fixing the date of final judgment? This was the issue in *Cavinder Elevators Inc. v. Hall*.<sup>142</sup> In *Cavinder*, the plaintiff timely commenced an appeal when his motion to correct error was deemed denied because the trial judge did not rule on it within thirty days. Later when the motion was belatedly granted, the defendant immediately took an appeal and the plaintiff curtailed the appeal to raise the same issues on cross-error. The court of appeals treated the belated granting of the motion as a nullity, leaving the plaintiff in jurisdictional limbo. The Indiana Supreme Court reversed, treating the belated ruling as voidable, but not a nullity.<sup>143</sup> Because the plaintiff had timely filed an original appeal, this preserved his right to present issues on appeal. This case leaves the status of orders belatedly granting motions to correct error in some doubt as to the final judgment rule.

5. *Oral Mediation Agreements.*—In a significant case for mediation practice, the Indiana Supreme Court ruled that a mediator may not testify in an action to enforce an oral settlement agreement where the agreement was reached through a mediation process governed by the Indiana Alternative Dispute Resolution Rules.<sup>144</sup> Statements made in settlement negotiations are not admissible in evidence.<sup>145</sup> However, once a settlement agreement is reached, it is enforceable.<sup>146</sup> Nonetheless, the A.D.R. rules direct that settlements reached through mediation should be reduced to a writing.<sup>147</sup>

In *Vernon v. Acton*,<sup>148</sup> the defendant asserted the existence of a settlement agreement as an affirmative defense to the plaintiffs' action for damages arising from an automobile collision. To enforce the settlement, the defendant

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139. 723 N.E.2d 967 (Ind. Ct. App. 2000)

140. See *id.* at 968.

141. 720 N.E.2d 731 (Ind. Ct. App. 1999), *trans. granted and order vacated by* 737 N.E.2d 745 (Ind. 2000).

142. 726 N.E.2d 285 (Ind. 2000).

143. See *id.* at 291.

144. See *Vernon v. Acton*, 732 N.E.2d 805 (Ind. 2000).

145. IND. EVIDENCE RULE 408.

146. *Germania v. Thermasol, Ltd.*, 569 N.E.2d 730, 732 (Ind. Ct. App. 1991).

147. See IND. ALTERNATIVE DISPUTE RULE 2.7(E)(2), GUIDELINE 8.8 (amended 2000). The guideline has since been amended to clarify that such settlements must be in writing. See *id.*

148. 732 N.E.2d at 805.



introduced evidence at a pre-trial hearing tending to show that an oral agreement had been reached during a mediation process. The parties had agreed the process would be governed by the A.D.R. rules. The mediator was called over the objections of the plaintiffs that the information was confidential and privileged. The trial court allowed the mediator to testify that an agreement was reached, but did not allow evidence regarding the events leading up to it.<sup>149</sup> The court of appeals affirmed the trial court's action, but the Indiana Supreme Court reversed.<sup>150</sup>

Noting that the question of whether oral mediation agreements should be enforceable is an issue in law reform,<sup>151</sup> the court held that "the mediation confidentiality provisions of our A.D.R. rules extend to and include oral settlement agreements undertaken or reached in mediation."<sup>152</sup> In the court's view, this result is consistent with the policies of the alternative dispute resolution rules, especially their emphasis on confidentiality and the need to memorialize mediated settlements in writing. The practical effect of this holding is that settlement agreements reached in mediation will hereafter be unenforceable unless reduced to a writing in compliance with the alternative dispute resolution rules because, in the court's view, they are "compromise settlement regulations." Following *Vernon, Silkey v. Investors Diversified Services, Inc.*,<sup>153</sup> which ordered an oral agreement reached in mediation reduced to a writing, is disapproved.

#### IV. DECISIONS FROM THE COURT OF APPEALS

The Indiana Court of Appeals addressed a myriad of issues affecting civil practice during the survey period. Standards for motions to dismiss and motions for summary judgment under Indiana Trial Rules 12 and 56 were recurring themes, as was the proper interpretation of the venue rule, Trial Rule 75, particularly as it affects the concept of "preferred venue."<sup>154</sup> Perhaps the most important decision is *Sims v. United States Fidelity & Guaranty*.<sup>155</sup>

In *Sims*, the court of appeals held that section 22-3-4-12.1 of the Indiana Code (worker's compensation "bad faith" statute) violated the open courts provision of the Indiana Constitution and the right to jury trial. In *Sims*, the plaintiff employee was injured and repeatedly attempted to contact his insurance carrier to arrange for medical services, but the carrier allegedly did not respond. He filed an action for gross negligence, intentional infliction of emotional distress, and intentional deprivation of his statutory rights under the Worker's

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149. See *id.* at 806-07.

150. See *id.*

151. See *id.* at 809.

152. *Id.* at 810.

153. 690 N.E.2d 329 (Ind. Ct. App. 1997).

154. IND. TRIAL RULE 75.

155. 730 N.E.2d 232 (Ind. Ct. App. 2000), *trans. granted*, No. 49502-0105-CV-229, 2001 IND. LEXIS 416, at \*1 (Ind. May 4, 2001).



Compensation Act.<sup>156</sup> The trial court granted the insurance company's motion to dismiss for lack of subject matter jurisdiction on the ground that section 22-3-4-12.1 of the Indiana Code invested the Worker's Compensation Board with exclusive jurisdiction over claims that an insurance carrier had committed an independent tort in dealing with an employee's claim for coverage.<sup>157</sup>

On review, the court of appeals held this rule unconstitutional, following the Indiana Supreme Court's opinion in *Stump v. Commercial Union*.<sup>158</sup> *Stump* had addressed the extent to which claims by an employee against third parties would be subject to the worker's compensation schema, rather than trial court jurisdiction, and indicated that such claims would not be within the exclusive jurisdiction of the Worker's Compensation Board.<sup>159</sup> The legislature responded and amended the worker's compensation statute to expressly provide that the Board had "the exclusive jurisdiction to determine whether the . . . [employer's] worker's compensation insurance carrier has . . . committed an independent tort in adjusting or settling the claim for compensation."<sup>160</sup> Notwithstanding this sequence of events, the appellate court struck the amendment on the authority of *Stump* and the later decided *Martin v. Richey*.<sup>161</sup> As the court of appeals stated:

*Martin* unequivocally held that the General Assembly can abrogate common law rights and remedies, as long as doing so does not interfere with constitutional rights. Removing a worker's access to the court for a determination of the worker's independent cause of action against a worker's compensation insurance carrier is not constitutionally permissible. The result is to deprive injured workers who have been subsequently harmed by the malfeasance of the insurer the right to a complete tort remedy. This is not the type of harm that the Worker's Compensation Act was intended to compensate.<sup>162</sup>

*Sims* was not the only important court of appeals' opinion issued in 2000. Following are brief summaries of some of the most significant decisions organized alphabetically by topic.

#### A. Default

Again illustrating that Indiana's courts prefer to reach the merits of a case, the court of appeals in *Kelly v. Bennett*,<sup>163</sup> reversed a denial of a motion to set aside a default for service defects, where the sheriff merely left a copy of the summons and complaint at defendant's business address so the attempt at service

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156. *See id.* at 233.

157. *See id.*

158. 601 N.E.2d 327 (Ind. 1992).

159. *See id.* at 330-32.

160. IND. CODE. § 22-3-4-12.1(a) (2000). *See also* Borgman v. State Farm Ins. Co., 713 N.E.2d 851, 855 (1999).

161. 711 N.E.2d 1273 (Ind. 1999).

162. *Sims*, 730 N.E.2d at 236.

163. 732 N.E.2d 859 (Ind. Ct. App. 2000).



was a total failure. Because the service defects could not be cured, the grounds for relief were not merely technical.<sup>164</sup>

### B. Discovery

In *Andreatta v. Hunley*,<sup>165</sup> the court of appeals approved the trial court's use of its discretionary power to fashion a discovery procedure under Trial Rule 34. The trial court had required the plaintiff to execute authorizations so that out-of-state medical records not reachable by subpoena could be made available in an Indiana action.<sup>166</sup> In *Old Indiana Limited Liability Co. v. Montano*,<sup>167</sup> the court of appeals stated in dicta that all examinations under Trial Rule 35 must be conducted under the direction of a physician, even if they concern psychological conditions.

### C. Failure to Prosecute

*Metcalf v. Estate of Hastings*,<sup>168</sup> established that once a party or his attorney has been given the required notice of a hearing on a motion to dismiss for failure to prosecute, dismissal may be granted, even if no one attends on behalf of the party whose claim is the subject of the motion.<sup>169</sup>

In *Indiana Insurance Co. v. Insurance Co. of North America*,<sup>170</sup> the court of appeals allowed an action to be reinstated more than one year after a dismissal for failure to prosecute. The appellate court concluded that it was appropriate for the trial court to grant relief under Trial Rule 60(B)(8), because neither party had received notice of the dismissal, the parties had continued litigating, and there was a good faith dispute on the merits.<sup>171</sup>

### D. Final Judgment

The court in *Waas v. Illinois Farmers Insurance Co.*<sup>172</sup> held that a final judgment ousts a trial court from jurisdiction to consider a motion for reconsideration. Instead, matters to be reconsidered should be raised as a motion to correct errors, which motion must be made within thirty days of the entry of judgment. Moreover, the appellate court reiterated that trial courts do not have the discretion to grant extensions of time for motions to correct errors.<sup>173</sup>

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164. See *id.* at 861-62.

165. 714 N.E.2d 1154 (Ind. Ct. App. 1999), *trans. denied*, 735 N.E.2d 220 (Ind. 2000).

166. See *id.* at 1157-58.

167. 732 N.E.2d 179, 185 n.2 (Ind. Ct. App.), *trans. denied*, No. 06A01-9904-CV-142, 2001 IND. LEXIS 18, at \*1 (Ind. Jan. 11, 2001).

168. 726 N.E.2d 372 (Ind. Ct. App.), *trans. denied*, 741 N.E.2d 1247 (Ind. 2000).

169. See *id.* at 374.

170. 734 N.E.2d 276 (Ind. Ct. App. 2000).

171. See *id.* at 278-81.

172. 722 N.E.2d 861 (Ind. Ct. App. 2000).

173. See *id.* at 863.



### *E. Intervention*

In *Warsco v. Hambright*<sup>174</sup> the court of appeals determined that a "legal interest" sufficient to justify intervention into a paternity action by a trustee in bankruptcy existed when the bankrupt mother was owed arrearages for child support.<sup>175</sup> Under Indiana law, an applicant must have a direct interest in an action to intervene as of right.<sup>176</sup> The court reasoned that once child support is past due and the custodial parent expends monies for the child's maintenance, any trusteeship over the delinquent monies ceases, and the arrearage is due to the custodial parent directly. When that parent files for bankruptcy protection, the arrearages become an asset of the bankrupt estate. This provides the bankruptcy trustee with a sufficient interest to intervene in a paternity action where support is at issue.<sup>177</sup>

### *F. Jurisdiction*

In *Brickner v. Brickner*,<sup>178</sup> the court of appeals construed the Uniform Interstate Family Support Act<sup>179</sup> and the federal Full Faith and Credit for Child Support Orders Act<sup>180</sup> to confer continuing jurisdiction on Indiana courts to enforce child support orders. This is the case so long as the obligor, obligee, or child is an Indiana resident. In that circumstance, Indiana law also determines whether a minor has been emancipated.<sup>181</sup>

Paralleling the approach taken by the Indiana Supreme Court in *State Board of Tax Commissioners v. Montgomery*,<sup>182</sup> in *Save the Valley, Inc. v. Indiana Department of Environmental Management*,<sup>183</sup> the court of appeals concluded that even though a challenge to an Indiana state permit scheme for animal feed lots was based on constitutional grounds, administrative remedies still had to be exhausted before the trial court had subject matter jurisdiction.

### *G. Limitations of Actions*

In *Troyer v. Cowles Products Co.*,<sup>184</sup> a seller of goods brought a third-party action on an account against a buyer. The trial court applied a six-year statute of limitations to the action. On review, the court of appeals held that the Uniform Commercial Code's four-year limitations period for breach of contracts

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174. 735 N.E.2d 844 (Ind. Ct. App. 2000), *trans. granted*, No. 02504-0104-CV-212, 2001 IND. LEXIS 348, at \*1 (Ind. Apr. 16, 2001).

175. *Id.* at 846.

176. *See* IND. TRIAL RULE 24.

177. *See Warsco*, 735 N.E.2d at 846-47.

178. 723 N.E.2d 468 (Ind. Ct. App.), *trans. denied*, 735 N.E.2d 235 (Ind. 2000).

179. IND. CODE § 31-18-2-5 (2000).

180. 28 U.S.C.A. § 1738B (2000).

181. *See Brickner*, 723 N.E.2d at 473.

182. 730 N.E.2d 680 (Ind. 2000).

183. 724 N.E.2d 665 (Ind. Ct. App.), *trans. denied*, 741 N.E.2d 1248 (Ind. 2000).

184. 732 N.E.2d 246 (Ind. Ct. App.), *trans. denied*, 741 N.E.2d 1258 (Ind. 2000).



applied, rather than the six-year limitations period for actions on accounts because the case involved a transaction in goods and legislation designates that the UCC's statute governs.<sup>185</sup>

In *Ling v. Stillwell*,<sup>186</sup> the principles of *Martin v. Richey*<sup>187</sup> were used in a new context. The decedent was one of the people murdered by Orville Lynn Majors. Because the representative of his estate could not have known that the real cause of his death was homicide, the court of appeals concluded that the statute of limitations for action against the hospital was unconstitutional as applied to him.<sup>188</sup>

In *Burton v. Elskens*,<sup>189</sup> a summary judgment decision for the defendant that was based on the statute of limitations was held proper, despite the allegation that the defendant doctor's conduct constituted a continuing wrong. The decedent's condition, a stroke, was not a latent condition that would have made it difficult to discover the malpractice before the limitations period ran.<sup>190</sup>

#### *H. Motions to Dismiss: Indiana Trial Rule 12(b)(6)*

As least one commentator asserts that confusion has emerged from several appellate cases regarding the standard of review for a rule 12(b)(6) motion to dismiss for failure to state a claim for relief.<sup>191</sup> Rule 12(b)(6) motions are to be determined on the basis of the allegations in the pleadings, not on facts outside them. If facts outside the pleadings are considered, then the motion should be treated as one for summary judgment. For instance, in *Yoder Grain Inc. v. Antalis*,<sup>192</sup> the court stated that the grant of dismissal under Rule 12(b)(6) should be sustained on any basis "found in the record." This is appropriate for summary judgment, where evidentiary matter can be considered, but not for a motion to dismiss under Rule 12(b)(6). The Indiana Supreme Court should clarify the appropriate standard for motions to dismiss for failure to state a claim for relief to resolve this and similar ambiguities.

With regard to the substance of rulings on 12(b)(6) motions, in *Ledbetter v. Ross*<sup>193</sup> the court of appeals found the elements to make out a claim for invasion of privacy lacking because, inter alia, no public disclosure of private fact was made. In *American Dry Cleaning & Laundry v. State*<sup>194</sup> the court of appeals

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185. See *id.* at 247.

186. 732 N.E.2d 1270 (Ind. Ct. App. 2000), *trans. denied*, No. 49A02-002-CV-119, 2001 IND. LEXIS 54, at \*1 (Ind. Jan. 17, 2001).

187. 711 N.E.2d 1273 (Ind. 1999).

188. See *id.* at 1274-75.

189. 730 N.E.2d 1281 (Ind. Ct. App. 2000).

190. See *id.* at 1284-85.

191. See William F. Harvey, *Mediation Agreements, Insurance Contracts, Motions to Dismiss*, RES GESTAE, Dec. 2000, at 46-48.

192. 722 N.E.2d 840, 845 (Ind. Ct. App. 2000).

193. 725 N.E.2d 120 (Ind. Ct. App. 2000).

194. 725 N.E.2d 96 (Ind. Ct. App. 2000).



dismissed an action for defamation and tortious interference with business relations. These claims were based on a previous action filed against the now plaintiff by the state for environmental violations. The court found that statements at issue were absolutely privileged because they were contained in pleadings in the prior litigation. Moreover, out-of-court statements made by the Attorney General were protected by immunity as they were within the scope of her public duties. Hence, the plaintiff could not establish claims on both theories and the grant of a 12(b)(6) motion was proper.<sup>195</sup>

### *I. Pleading*

Whether an amendment adding a party will relate-back to satisfy the statute of limitations was the issue in *Red Arrow Stables, Ltd. v. Velasquez*.<sup>196</sup> The appellate court concluded that notice given to the insurance carrier functions as constructive notice to the new party for purposes of Rule 15(C).<sup>197</sup> The court disapproved of cases requiring actual service of process on the carrier under Trial Rule 4. It relied on the Indiana Supreme Court's opinion in *Waldron v. Waldron*,<sup>198</sup> which held that a party received notice of the pendency of an action before the statute had run due to the notice given to the insurer and construed it to apply both to misnomer of a party and to the addition of new parties under Trial Rule 15.

### *J. Penalties*

Penalties against landowners who fail to make mandated repairs under section 36-7-9-7(d) of the Indiana Code are civil, not criminal; thus, they do not violate either the Indiana or federal constitutions for failing to follow criminal procedural safeguards.<sup>199</sup>

### *K. Summary Judgment*

Indiana courts continue to struggle with the standards for granting review of motions for summary judgment. One point of controversy is whether the appellate court is bound by findings and conclusions of the trial court or may affirm on any basis supported by the record. In *Ward v. First Indiana Plaza Joint Venture*,<sup>200</sup> a slip-and-fall action against a property management company, the court asserted that the trial court's grant of summary judgment for the defendant was sustainable on any theory or basis supported by the record, even if it is one

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195. See *id.* at 98-99.

196. 725 N.E.2d 110 (Ind. Ct. App.), *trans. denied*, *Girl Scouts of Calumet Council v. Velasquez*, 735 N.E.2d 238 (Ind. 2000).

197. See *id.* at 114-15.

198. 532 N.E.2d 1154 (Ind. 1989).

199. See *Freidline v. Civil City of South Bend*, 733 N.E.2d 490 (Ind. Ct. App. 2000).

200. 725 N.E.2d 134 (Ind. Ct. App.), *trans. denied*, 735 N.E.2d 238 (Ind. 2000).



not relied upon at the trial level.<sup>201</sup> At the same time, the court refused to consider a new basis for opposition to the motion, arguing that a party cannot change the theory of opposition to a motion for summary judgment on appeal.<sup>202</sup>

In *Coffer v. Arndt*,<sup>203</sup> the court of appeals affirmed summary judgment based on the statute of limitations in a medical malpractice action, despite the argument that the defendant's conduct constituted a continuing wrong and involved fraudulent concealment. Because the patient learned of the malpractice twenty-two months before expiration of the limitations period, the statute of limitations was constitutional as applied to him.<sup>204</sup> Moreover, for purposes of the "continuing wrong" doctrine, the statute ceased to be tolled upon the patient's last visit for services to the provider.<sup>205</sup> Even if fraudulent concealment occurred, the patient's delay in bringing the action after discovering the true facts was unreasonable.

In *Aldrich v. Coda*,<sup>206</sup> another malpractice action, the court grappled with the question of whether an affidavit raised a genuine issue of material fact. The court of appeals held that the affidavit of an orthopedic surgeon was sufficient to raise a triable question of fact as to a podiatrist's malpractice, although it only alleged familiarity with the general standard of care.<sup>207</sup>

In *Estate of Verdi v. Toland*,<sup>208</sup> the court looked at how questions of soundness of mind and undue influence should be analyzed for purposes of summary judgment. The court of appeals concluded that evidence of a prior diagnosis of a condition that affected mental competence was admissible to oppose a motion for summary judgment. Moreover, the prior diagnosis created a triable issue of fact as to the soundness of the testator's mind when the will was executed, thereby precluding summary judgment.<sup>209</sup>

In *Auto-Owners Insurance Co. v. Cox*,<sup>210</sup> the court of appeals had to consider the effect of the plaintiff's argument that the defendant insurer had waived the statute of limitations defense—either expressly or impliedly. Waiver is a fact sensitive issue unlikely to be determined on summary judgment. Thus, where the insured asserted facts showing that the defendant impliedly waived the statute of limitations by failing to make repairs as contemplated, summary judgment was precluded.<sup>211</sup>

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201. *See id.* at 136.

202. *See id.* at 137.

203. 732 N.E.2d 815 (Ind. Ct. App. 2000).

204. *See id.* at 821.

205. *Id.*

206. 732 N.E.2d 243 (Ind. Ct. App. 2000).

207. *See id.* at 245-46.

208. 733 N.E.2d 25 (Ind. Ct. App. 2000), *trans. denied*, No. 74A01-9908-CV-277, 2001 IND. LEXIS 94, at \*1 (Ind. Jan. 30, 2001).

209. *See id.* at 28-29.

210. 731 N.E.2d 465 (Ind. Ct. App. 2000).

211. *See id.* at 467-68.



The issue in *Brannon v. Wilson*<sup>212</sup> was how proximate causation should be handled. The trial court concluded that the question of whether an injury worsened the plaintiff's pre-existing condition created a genuine issue of material fact, but the appellate court disagreed. The plaintiff's decedent suffered from a chronic liver disease, which appeared to cause his death. Defendant's medical expert stated that the accident did not cause or exacerbate decedent's condition. The plaintiff submitted a counteraffidavit by a medical expert that opined it was only "possible" the liver condition may have been worsened due to the defendant's acts. The court of appeals reversed the trial court's denial of the motion for summary judgment, asserting that "a plaintiff should not be permitted to require a defendant to enter into a full-scale trial defense of a claim which is supported solely by speculation or mere possibility."<sup>213</sup> This case continues the dispute over the proper scope of summary judgment and how the Indiana Supreme Court's construction of the rule is being interpreted by lower courts.

### L. Trial

In *Webber v. Miller*<sup>214</sup> the court of appeals ruled it reversible error where the trial court conducted a bench trial, although the draft pre-trial order, signed by both parties, set the cause for a jury trial. It reached this conclusion even though no party had requested a jury in the pleadings.<sup>215</sup> In *In re Roberts*<sup>216</sup> the court of appeals held that a trial judge may question witnesses in a commitment proceeding, even in the absence of the attorney for the social worker, without violating the duty of impartiality or the due process rights of the patient. The appellate court stressed the special nature of commitment proceedings and that more latitude is given judges to question witnesses in bench trials.<sup>217</sup>

### M. Venue

The question of a litigant's bona fides in making personal property allegations so as to come within Trial Rule 75(A)(2) continues to be an issue for Indiana courts. In *Halsey v. Smeltzer*,<sup>218</sup> which parallels the analysis in *Banjo Corp. v. Pembor*,<sup>219</sup> the court refused to consider the plaintiff's motive in pleading damage to personal property though the allegations may have been a "subterfuge."<sup>220</sup> Instead, the court permitted the venue because it fit within the literal language of the statute.

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212. 733 N.E.2d 1000 (Ind. Ct. App. 2000).

213. *Id.* at 1001.

214. 731 N.E.2d 476 (Ind. Ct. App. 2000).

215. *See id.* at 477.

216. 723 N.E.2d 474 (Ind. Ct. App. 2000).

217. *See id.* at 476.

218. 722 N.E.2d 871 (Ind. Ct. App.), *trans. denied*, 735 N.E.2d 237 (Ind. 2000).

219. 715 N.E.2d 430 (Ind. Ct. App. 1999).

220. *Halsey*, 722 N.E.2d at 873.



In *Shelton v. Wick*,<sup>221</sup> the court of appeals addressed various issues concerning proper venue that arose in a medical malpractice action against the estate of a deceased physician. In essence, the court held that the estate and personal representative could not be treated as "individual defendants" for preferred venue purposes.<sup>222</sup> Moreover, the action was not a probate claim for venue purposes. Finally, the court stated that venue is to be determined at the time the complaint is filed, so that preferred venue questions can only be determined at that time.<sup>223</sup>

A written stipulation as to preferred venue must be signed by all parties to the lawsuit when the action is filed. If it is not, the stipulation is ineffective according to the court of appeals in *City of South Bend, Department of Public Works v. D & J Gravel Co.*<sup>224</sup> Moreover the court stated that the preferred venue rule makes no distinctions between the grounds of preferred venue, and if a suit is initially filed in a county of preferred venue, a transfer of venue will not be granted to another location of preferred venue. The court stressed that a trial court's disposition of a motion for transfer of venue is an interlocutory order that must be reviewed under an abuse of discretion standard, but that abuse occurred where the trial court did not transfer action to a county where the city was located.<sup>225</sup> In *Trustees of Purdue University v. Hagerman Construction Corp.*,<sup>226</sup> the court of appeals reiterated that the granting of motions venue under 75(A) are reviewed for abuse of discretion and that a sufficient nexus for preferred venue based on the location of land existed where action for breach of construction contract was brought.

In *Ford v. Culp Custom Homes, Inc.*,<sup>227</sup> transfer of venue pursuant to Trial Rule 75 is the remedy where the contractor files suit to enforce a mechanic's lien in a county other than where the realty is located. When a case has been transferred for improper venue, the only precondition to jurisdiction being transferred is the payment of costs in the transferor court and not the transfer of the record to the transferee court.<sup>228</sup> Thus, in *Ahmad v. Duncan*,<sup>229</sup> the court of appeals reversed the original trial court's resumption of jurisdiction, even though the defendant had not filed the record in the new court.<sup>230</sup>

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221. 715 N.E.2d 890 (Ind. Ct. App.), *trans. denied*, 735 N.E.2d 219 (Ind. 2000).

222. *Id.* at 893.

223. *See id.* at 895.

224. 727 N.E.2d 719, 722 (Ind. Ct. App. 2000).

225. *See id.* at 721.

226. 736 N.E.2d 819, 820 (Ind. Ct. App. 2000) (citing *D. & J. Gravel Co.*, 727 N.E.2d at 721).

227. 731 N.E.2d 468 (Ind. Ct. App.), *trans. denied*, No. 46A03-0002-CV-39, 2000 IND. LEXIS 1182, at \*1 (Ind. Dec. 4, 2000).

228. *See id.* at 473-74.

229. 732 N.E.2d 862 (Ind. Ct. App. 2000), *trans. denied*, No. 49A04-0001-CV-31, 2001 IND. LEXIS 16, at \*1 (Ind. Jan. 10, 2001).

230. *See id.* at 865.



## V. RULE CHANGES

In addition to the New Appellate Rules, the Indiana Supreme Court also promulgated rule amendments affecting Alternative Dispute Resolution, the Indiana Supreme Court's original jurisdiction, some trial rules, and court administration.

### *A. Amendments to the Rules for Alternative Dispute Resolution*

On January 1, 2001, a series of amendments to the Indiana Rules for Alternative Dispute Resolution became effective.<sup>231</sup> Rules 1.4, 1.6, 2.6, 2.7, 7.3, Guideline 8.8 and Form B were the subject of these changes.

With regard to scope, Rule 1.4 was simplified such that the rules now "apply in all civil and domestic relations litigation filed in all Circuit, Superior, County, Municipal, and Probate Courts in the state."<sup>232</sup> Moreover, some enumerated exclusions of particular actions from alternative dispute resolution were deleted.<sup>233</sup> Rule 2.6 has been modified to make the setting of hourly rates for mediation discretionary, not mandatory, when the parties cannot otherwise agree.<sup>234</sup> After the amendments, Rule 2.7(A)(1) is deleted so that the mediator is not explicitly required to inform the parties of factual documentation revealed in mediation, where the parties agree to its disclosure.<sup>235</sup> Rule 2.7(C) is also amended to delete the five-day time limit for making supplementary materials, such as damage brochures or videos, available to opposing counsel. The last sentence of section 2.7(C), relating to sharing information about settlement authority, is deleted. The neutral party (i.e., mediator, arbitrator, etc.) is no longer required by A.D.R. rule 7.3 to affirmatively explain the extent to which information obtained through alternative dispute resolution may not be protected from disclosure.<sup>236</sup> Finally, Guideline 8.8, governing settlement agreements, is amended to make clear that such agreements must be reduced to a writing.<sup>237</sup> This amendment conforms with the Indiana Supreme Court's recent opinion in *Vernon v. Acton*,<sup>238</sup> which has the effect of making oral settlements reached in mediation unenforceable.<sup>239</sup>

### *B. Original Jurisdiction in the Indiana Supreme Court*

To conform the Indiana Rules of Procedure for Original Actions to the New

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231. See Order Amending Rules for Alternative Dispute Resolution, Ind. Order No. 2000-30 (2000).

232. See IND. ALTERNATIVE DISPUTE RESOLUTION RULE 1.4 (amended 2000).

233. See *id.*

234. See A.D.R. 2.6.

235. See A.D.R. 2.7; see also Order Amending Rules for Alternative Dispute Resolution, Ind. Order No. 2000-30 (2000).

236. See A.D.R. 7.3(A).

237. See A.D.R. 8.8.

238. 732 N.E.2d 805 (Ind. 2000).

239. See *id.* at 810.



Appellate Rules, Rule 1 on scope has been amended. Various amendments to Rules 2, 3, 5, and 6 regarding writs of prohibition and mandamus have also been made.<sup>240</sup> In addition, to accommodate the repeal of section 34-1-58-1 of the Indiana Code<sup>241</sup> governing writs of mandate and prohibition and its recodification in section 34-27-3-1 of the Indiana Code,<sup>242</sup> Rule 1(D) on scope is amended to reflect the new statute. Rule 2 clarifies the procedure of filing and service for applications for such writs. Rule 2(G) thereof stipulates the meaning of "parties" and "party." Rule 3 has also been modified so that the filing of an alternative writ form is optional, not mandatory.<sup>243</sup> New Rule 4 relaxes the time limit for setting any hearing.<sup>244</sup> Rule 5 details the procedure on disposition of writs of mandamus and prohibition, including time limits, and Rule 6 governs service of papers before any hearing.<sup>245</sup>

### C. Trial Rules

Trial Rule 25 on substitution of parties has been amended to delete the option of making a motion in the appellate court for the substitution; the procedure now is to file a notice with the Clerk of the Court.<sup>246</sup> Trial Rule 63 has also been amended to require locally appointed judges pro tempore to be paid twenty-five dollars per day for their service.<sup>247</sup> Ministerial changes have been made to Trial Rules 50 (motion for judgment on the evidence), 53.3 (time limit on motion to correct errors), 59 (motion to correct errors), and 60 (motion for relief from judgment or order) to conform them to the New Appellate Rules and correct other language. Trial Rule 62 on stays of judgment has also been amended to make it clear that any party may seek such a stay, not just the appellant.<sup>248</sup>

### D. Possible Rule Changes

Late in 2000, the Indiana Supreme Court released a series of proposed amendments to the Indiana Trial Rules for public comment.<sup>249</sup> Indiana

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240. For the text of the order amending these rules, see Order Amending Rules of Procedure for Original Actions, Ind. Order No. 2000-24 (2000).

241. IND. CODE § 34-1-58-1 (repealed 1998).

242. See *id.* § 34-27-3-1 (2000).

243. See IND. ORIGINAL ACTION RULE 3(E) (amended 2000).

244. See ORIG. ACT. R. 4(A).

245. See ORIG. ACT. R. 5, 6.

246. See T.R. 25.

247. See T.R. 63(D).

248. See T.R. 50, 53.3, 59, 60, 62.

249. These amendments affect Trial Rules 4 (process), 5 (service and filing of pleadings and other papers), 15 (relation back of amendments), 45 (subpoenas), 53.1 (exception for failure to timely rule on motions), 53.153.3 (final judgment and failure to rule on a motion to correct errors), 56 (summary judgment), and 79 (special judges), available at <http://www.state.in.us/judiciary/ruleamnd/Allrules.pdf>. Notable are changes to T.R. 5 allowing for service of documents by commercial carriers; to T.R. 15 clarifying the time limits for relation-back of amendments; to T.R.



practitioners would be well served in closely following the progress of these proposed amendments. In addition to these pending changes, the court also sought public comment on a series of amendments to the Indiana Rules for Small Claims.<sup>250</sup>

## VI. FEDERAL PRACTICE

In 2000, the most significant activity affecting federal civil practice arose from rule changes and U.S. Supreme Court decisions further curtailing congressional statutory authority under principles of federalism. Amendments to the Federal Rules of Civil Procedure now make automatic disclosures mandatory for discovery in all federal district courts, and other rule revisions are proceeding through the rulemaking process. At the level of the U.S. Supreme Court, decisions carry forward the themes of *United States v. Lopez*<sup>251</sup> (commerce clause), *Seminole Tribes of Florida v. Florida*<sup>252</sup> (Eleventh Amendment), and *City of Boerne v. Flores*<sup>253</sup> (enforcement powers under the Fourteenth Amendment), which restrict federal power to legislate, and apply them in new contexts. In Congress, there were few enactments that affected federal practice. However, procedural decisions from the Seventh Circuit Court of Appeals did cover a diverse array of topics.

### A. Procedural Legislation

Perhaps due to the distractions of the election cycle, very little activity on procedural questions issued from the 106th Congress. The Federal Courts Improvement Act of 2000<sup>254</sup> was enacted in November. It clarifies various matters regarding the retirement, status, and powers of bankruptcy and magistrate judges and, most notably, extends the contempt powers of magistrate judges in several contexts. H.R. 1875<sup>255</sup> and S. 353<sup>256</sup> would have conferred subject-matter jurisdiction on federal courts over state class actions on merely minimal, not full,

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45 allowing attorneys to issue subpoenas in pending actions where the attorney has entered an appearance for a party; to T.R. 53.1 establishing that referring a case to alternative dispute resolution creates an exception to the time limits for ruling on motions; to T.R. 53.3 explicitly providing that, after the passage of time limits for ruling on a motion to correct errors so that the motion is deemed denied, the judgment shall become final and also providing that a judge's actual notice of the running of the time period obviates the requirement of service on him and allows the final judgment rule to apply; and to T.R. 56 imposing an outside limit of 120 days before trial for moving for summary judgment.

250. See *Comment Sought on Proposed Rule Amendments*, *supra* note 7.

251. 514 U.S. 549 (1995).

252. 517 U.S. 44 (1996).

253. 521 U.S. 507 (1997).

254. Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, 114 Stat. 2410 (2000).

255. H.R. 1875, 106th Cong. (1999).

256. S. 353, 106th Cong. (1999).



diversity; however, these measures were not enacted. H.R. 2112<sup>257</sup> would have authorized federal district courts presiding over multidistrict litigation to retain those matters for trial, thus legislatively overruling the decision in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*.<sup>258</sup> However, actions would still have had to be remanded to the transferor court for assessment of compensatory damages, unless the Panel on Multidistrict Litigation allowed retention. This bill, too, was not passed. Finally, legislation was also introduced, but not enacted, in the 106th Congress that would have established an Asbestos Resolution Corporation to determine eligibility for awards for asbestos injuries.<sup>259</sup>

Legislation entitled the "Paycheck Fairness Act"<sup>260</sup> is pending in the 107th Congress. It would amend the Fair Labor Standards Act<sup>261</sup> to provide additional relief for gender discrimination in wages and expand possible remedies, including the availability of class actions.<sup>262</sup> Also, in the 107th Congress, H. R. 199<sup>263</sup> has just been introduced to amend rule 26 of the Federal Rules of Civil Procedure to protect the personnel records and personal information of law enforcement officials from discovery.

#### *B. U.S. Supreme Court and Seventh Circuit Decisions*

In the 1999-2000 Term, the U.S. Supreme Court continued to narrow the ambit of Congress' legislative power as it maintained a focus on federalism. Following the themes introduced by *United States v. Lopez*,<sup>264</sup> *Seminole Tribes of Florida v. Florida*,<sup>265</sup> and *City of Boerne v. Flores*,<sup>266</sup> the Court decided a number of cases that implicate the limits of federal authority. Although *Lopez*, *Seminole Tribes*, and *City of Boerne* all involve different aspects of the constitution, they function synergistically to quite dramatically shift power from the federal government to the states. In *Lopez*, the Court narrowed the definition of "commerce" by closely associating it with mercantile activity; at the same time it restricted Congress's power to aggregate the effects of intrastate activities on interstate commerce to provide a basis for legislation under the commerce power. In *Seminole Tribes* it interpreted the states' Eleventh Amendment immunity from private damage actions expansively, so that Congress' ability to abrogate that immunity in the exercise of its Article I enumerated powers was cast in doubt. In *City of Boerne v. Flores*, the Court signaled that it would narrowly construe the nature and extent of constitutional rights in order to insulate the states from

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257. H.R. 2112, 106th Cong. (1999).

258. 523 U.S. 26 (1998).

259. S. 758, 106th Cong. (1999); H.R. 1283, 106th Cong. (1999).

260. S. 8, 107th Cong. (2001); S. 77, 107th Cong. (2001).

261. Fair Labor Standard Act of 1938, 29 U.S.C. § 201 (2000).

262. S. 8, § 203, 107th Cong. (2001); S. 77, § 3(e), 107th Cong. (2001).

263. H.R. 1999, 107th Cong. (2001).

264. 514 U.S. 549 (1995).

265. 517 U.S. 44 (1996).

266. 521 U.S. 507 (1997).



Congressional legislation designed to enforce them. All of these opinions function together to limit a plaintiff's power to use federal law to secure relief. The result should be the redirection of litigation to the state courts and the attempted reframing of federal rights in terms of state law.

Following *Lopez*, in *United States v. Morrison*,<sup>267</sup> by a 5-4 margin, the Court invalidated the civil remedies provisions of the Violence Against Women Act,<sup>268</sup> holding these provisions beyond the powers of Congress both under the commerce clause and the Fourteenth Amendment.<sup>269</sup> In so doing, it underlined the distinctly economic definition given interstate commerce in *Lopez*, further curtailed the power of Congress to aggregate effects of intrastate activity on commerce, and also held that the remedial provisions of the Act were directed to private behavior, so that the state action requirement of the Fourteenth Amendment was not satisfied.<sup>270</sup>

In a recent opinion, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*,<sup>271</sup> the Supreme Court held that the Army Corps of Engineers exceeded the powers of the Clean Water Act (CWA),<sup>272</sup> when the Corps enlarged by rule the definition of "navigable waters." The litigation involved an environmental dispute over the development of a hazardous waste facility on wetlands in the path of migratory birds. The Corps had crafted a rule, the "Migratory Bird Rule,"<sup>273</sup> under which it exerted jurisdiction over wetlands that were not part of interstate navigable waters. The rule was justified on the theory that intrastate harm to migratory bird species created a substantial effect on interstate commerce.<sup>274</sup> Following the reasoning of *United States v. Morrison*,<sup>275</sup> the Court stated that congressional power to regulate intrastate activities that substantially affect interstate commerce, "raises significant constitutional questions."<sup>276</sup> It went on to invalidate the Migratory Bird Rule on the ground that, in the absence of clear congressional intent, the agency should not be allowed to interpret the CWA so as to take it to the limits (and perhaps beyond) of federal power.<sup>277</sup> By this reasoning the Court reveals that it will even scrutinize environmental legislation for violations of federalism, as well other statutory schema.

The Eleventh Amendment was the focus in *Kimel v. Florida Board of*

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267. 120 S. Ct. 1740 (2000).

268. Violence Against Women Act of 1994, Pub. L. 103-322, Title IV, 108 Stat. 1902.

269. See *id.* at 1752-59.

270. See *id.*

271. 121 S. Ct. 675 (2001).

272. Clean Water Act, 33 U.S.C. § 1344(a) (2000).

273. Migratory Bird Rule, 51 Fed. Reg. 41,217 (1986).

274. See *Solid Waste Agency*, 121 S. Ct. at 681.

275. 120 S. Ct. 1740 (2001).

276. *Solid Waste Agency*, 121 S. Ct. at 683.

277. See *id.* at 688.



*Regents*,<sup>278</sup> as it had been in *Seminole Tribe*.<sup>279</sup> In that case, which consolidated actions against universities in Alabama and Florida, middle-aged and older professionals sued for money damages alleging that the universities discriminated against them on the basis of their age. *Kimel* raised the question of the immunity of state employers from private damage actions under the Age Discrimination in Employment Act (ADEA).<sup>280</sup> In *Kimel* the Court used a two-part test to determine abrogation of immunity—whether Congress expresses an unequivocal intent to overcome state immunity and whether in so doing, it acts pursuant to a valid grant of constitutional authority. By another 5-4 decision, the Court concluded that although the Act showed Congress' clear intent to overcome state immunity for ADEA violations, it was an impermissible exercise of its enforcement powers under Section 5 of the Fourteenth Amendment.

In 1997 the Court had invalidated the Religious Freedom Restoration Act, (RFRA) in *City of Boerne v. Flores*.<sup>281</sup> Congress had predicated its power to pass RFRA on the notion that the free exercise of religion is a constitutional right incorporated and enforceable against the states under the Fourteenth Amendment. In passing on this claim, the Court introduced a new element into its analysis of Congress' powers—the requirement that to be proper under Section 5, any remedy legislated by Congress must be “congruent and proportional” with the Fourteenth Amendment right to be vindicated. According to the majority, this restriction was needed to prohibit Congress from creating “new” substantive rights under the rubric of Fourteenth Amendment enforcement and to police the separation of powers between the judiciary and Congress.<sup>282</sup> In practice this new proportionality test has allowed the Court to second guess important factual and policy determinations made by Congress. As it impacts the interface between civil rights legislation (such as the ADEA) and states' Eleventh Amendment immunity, it functions as a barrier to private damage actions.

Following *City of Boerne*, the *Kimel* majority asserted that to properly come within the scope of Section 5, ADEA remedies must show a congruent and proportional relation between the means adopted to prevent injury and the injury itself.<sup>283</sup> This standard was difficult to meet, because the Court also relied on the principle that states could constitutionally discriminate on the basis of age if the discrimination were rationally related to a legitimate state interest. In this way the lower standard of review for classifications based on age—rational basis—interacted with the majority's restrictive interpretation of Section 5 of the Fourteenth Amendment to virtually guarantee that congruence and proportionality would not be satisfied. Thus, the Court found that the state's immunity was not overcome.<sup>284</sup> Soon the Court would apply this analysis to

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278. 120 S. Ct. 631 (2000).

279. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

280. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (2000).

281. 521 U.S. 507 (1997).

282. *See id.* at 509-10.

283. *See id.* at 644-45.

284. *See id.* at 646.



erode the protection of the Americans With Disabilities Act.<sup>285</sup>

In another case from Alabama, the Court has concluded that states are immune from private damage actions under the Americans With Disabilities Act (ADA). *University of Alabama at Birmingham Board of Trustees v. Garrett*,<sup>286</sup> presented consolidated damage actions filed by employees against the University of Alabama and the Alabama Department of Youth Services for, inter alia, violation of the ADA. The district court dismissed the claims on Eleventh Amendment grounds and the Eleventh Circuit reversed in part, holding that states are not immune from private ADA claims. On review and following *Kimel*, the U.S. Supreme Court concluded that Congress had gone beyond the enforcement powers granted it by Section 5 of the Fourteenth Amendment because the wrong it tried to reach and the remedy chosen were not proportional. As it had with the Commerce Clause cases, the Court did not defer to Congress' findings as to the nature and effects of disability discrimination—particularly as related to state employers.

In a different context, but following a related theme, the Court clarified that states may not be sued by whistle blowers under the False Claims Act<sup>287</sup> *qui tam* provisions in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*.<sup>288</sup> The fact that punitive damages are available under the Act and would implicate the Eleventh Amendment was an important factor in the Court's reasoning that the statutory term "persons" does not include states.<sup>289</sup>

While the decisions from *Morrison* to *Garrett* show the sea-change in the Court's federalism jurisprudence, the Court did recognize Congress' power over states in *Reno v. Condon*.<sup>290</sup> There it unanimously validated the Driver's Privacy Protection Act<sup>291</sup> against Tenth Amendment challenge. It held that motor vehicle personal data collected by states about drivers and then sold is an article of commerce and so can be regulated under the Commerce Clause.<sup>292</sup> Then, it concluded that because the Act was directed to states in their proprietary, not sovereign, capacity, the prohibitions imposed by the Act did not violate the Tenth Amendment.<sup>293</sup>

Aside from the emphasis on federalism, the Court also decided a number of cases more directly affecting the mechanics of federal civil procedure. One important case, *Green Tree Financial Corp.-Alabama v. Randolph*,<sup>294</sup> emphasizes the federal policy of enforcing arbitration provisions, even when they affect

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285. See Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 (2000).

286. 193 F.3d 1214 (11th Cir. 1999), *cert. granted*, 120 S. Ct. 1669 (2000).

287. 31 U.S.C. § 3729 (2000).

288. 120 S. Ct. 1858 (2000).

289. *Id.* at 1869-70.

290. 120 S. Ct. 666 (2000).

291. Driver's Privacy Protection Act of 1994, Pub. L. 103-322, Title XXX, 108 Stat. 2099 (1994).

292. See *id.* at 671.

293. *Id.* at 671-72.

294. 121 S. Ct. 513 (2000).



federally protected rights. *Green Tree* involved a class action brought under the federal Truth in Lending Act,<sup>295</sup> which was dismissed with prejudice by the trial court following the grant of the defendant's motion to compel arbitration. The Eleventh Circuit reversed and remanded, but the Supreme Court disagreed with this disposition. Although it held that an arbitration order resulting in the dismissal of an action is an appealable "final decision" for purposes of the Federal Arbitration Act,<sup>296</sup> it also established that an arbitration agreement is not unenforceable due to the risk of prohibitive expense, unless the party seeking to avoid it can show the likelihood that he will actually incur those expenses.<sup>297</sup>

Judgments as a matter of law under Federal Rule of Civil Procedure 50 also garnered attention from the Supreme Court. *Weisgram v. Marley Co.*,<sup>298</sup> addressed a split in the circuits concerning the powers of appellate courts in connection with judgments as a matter of law. The Court held that appellate courts may simply direct entry of judgment after a jury verdict is reversed where the trial court had denied a judgment as a matter of law. Although it is within the appellate court's discretion to remand to the trial court to allow the verdict loser to move for a new trial, the Supreme Court made it clear that this is not required.<sup>299</sup> *Reeves v. Sanderson Plumbing Products, Inc.*,<sup>300</sup> an age discrimination case, raised the issue of the evidence to be considered by a court in ruling on a judgment as a matter of law. The Fifth Circuit concluded that the plaintiff had introduced insufficient evidence on intent to discriminate; the Supreme Court reversed and underlined that in ruling on a motion for judgment as a matter of law, the trial court not only should consider all evidence and make inferences from the evidence favoring the nonmovant, but also should consider evidence supporting the moving party that is uncontradicted and unimpeached.<sup>301</sup>

In *Cortez Bird Chips, Inc. v. Bill Harbet Construction Co.*,<sup>302</sup> the Court clarified that motions relating to awards under the Federal Arbitration Act<sup>303</sup> may be filed either in the district where the award is made or in any other venue that is proper under the general federal venue statute.<sup>304</sup> *Sims v. Apfel*,<sup>305</sup> a 5-4 decision, dealt with exhaustion of administrative remedies in the context of Social Security benefit claims. The Court decided that an applicant who pursues all remedies in the Social Security process including an appeal to the Social Security Appeals Council is not required to present all *issues* to preserve those issues for judicial review. The Court had crafted previously an "issue

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295. Truth in Lending Act, 15 U.S.C. § 1601 (2000).

296. Federal Arbitration Act of 1947, 9 U.S.C. § 16 (2000).

297. See *Green Tree Fin.*, 121 S. Ct. at 522-23.

298. 528 U.S. 440 (2000).

299. See *id.* at 456-57.

300. 120 S. Ct. 2097 (2000).

301. See *id.* at 2110-11.

302. 529 U.S. 193 (2000).

303. Federal Arbitration Act of 1947, 9 U.S.C. § 16 (2000).

304. 28 U.S.C. § 1391 (2000).

305. 530 U.S. 103 (2000).



exhaustion" requirement in addition to a remedies exhaustion requirement in other contexts, but did not extend that doctrine to Social Security proceedings in the Council.<sup>306</sup>

The boundaries of Federal Rule of Civil Procedure 15(c) were tested in *Nelson v. Adams, USA, Inc.*<sup>307</sup> The trial court allowed a party to amend the pleadings *after* judgment to add a new party and also amended the judgment itself to make the new party liable for attorneys fees previously awarded. The Supreme Court unanimously concluded that this application of the rule was a violation of due process rights.<sup>308</sup>

In *Arizona v. California*,<sup>309</sup> a water rights case, the Supreme Court reviewed preclusion in the context of an original proceeding. It reiterated that claim preclusion is an affirmative defense that may be waived through the passage of time, and it also suggested that normal principles of preclusion apply to original proceedings as well as other forms of action.<sup>310</sup> *Semtek International Inc. v. Lockheed Martin Corp.*,<sup>311</sup> recently decided in February 2001, addresses the important question of whether state or federal law governs when the preclusive effect of a judgment rendered by a federal court sitting in diversity is at issue. There in dicta, the Court indicated that the claim preclusive effect of prior proceedings is a matter of federal common law, not the Federal Rules of Civil Procedure. Thus, because in a diversity action state law governs substantive rights and liabilities, the state approach should also generally govern the claim preclusive effect of a prior federal diversity proceeding. However, the Court held open the possibility that the federal common law of preclusion could trump state law, if the application of state preclusion principles impairs federal interests.<sup>312</sup>

Unfortunately, the potential of *Free v. Abbott Laboratories Inc.*<sup>313</sup> to answer the question whether the supplemental jurisdiction statute<sup>314</sup> legislatively overrules *Zahn International Paper Co.*<sup>315</sup> was not realized last term. The Court split 4-4 on the question, with Justice O'Connor not participating. *Zahn* had held that in a spurious class action based on diversity, each class member must independently satisfy the amount in controversy for federal subject matter jurisdiction.<sup>316</sup> In *Free*, the Fifth Circuit had held that the supplemental jurisdiction statute sections 1367(a) and (b) abrogated the rule of *Zahn* rule, so that supplemental jurisdiction over unnamed class members in a diversity action

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306. See *id.* at 106-07.

307. 529 U.S. 460 (2000).

308. See *id.* at 471-72.

309. 120 S. Ct. 2304 (2000).

310. See *id.* at 2316-18.

311. 121 S. Ct. 1021 (2001).

312. See *id.* at 1023.

313. 529 U.S. 333 (2000), *aff'd per curiam by equally divided court.*

314. 28 U.S.C. § 1367 (2000).

315. 414 U.S. 291 (1973).

316. See *id.* at 301-02.



would be permissible.<sup>317</sup> Due to the tie, the Fifth Circuit's ruling is affirmed, but the status of *Zahn* is still in doubt in other circuits.<sup>318</sup>

The U.S. Court of Appeals for the Seventh Circuit decided a variety of cases affecting civil practice. Perhaps the opinion with the greatest practical impact on Indiana lawyers is *Judge v. Pilot Oil Corp.*,<sup>319</sup> which involved a choice of law question concerning the death of a Utah man who was killed in Indiana by a security guard. Construing the Indiana Supreme Court's decision modifying the *lex loci* standard for choice of law,<sup>320</sup> the Seventh Circuit held that Indiana law applied to determine the issues, including the amount recoverable for wrongful death, because the last event necessary for liability occurred in that state and was not an insignificant factor.<sup>321</sup> The Seventh Circuit issued a number of other important decisions.<sup>322</sup>

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317. See *Free v. Abbott Labs.*, 176 F.3d 298 (5th Cir. 1999) (final order dismissing action); *In re Abbott Labs.*, 51 F.3d 524, 528-29 (5th Cir. 1995) (interlocutory appeal).

318. See, e.g., *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214 (3d Cir. 1999) (finding supplemental jurisdiction statute does not overrule *Zahn* because Congress did not intend it to expand diversity jurisdiction); *Leonhardt v. Western Sugar Co.*, 160 F.3d 631 (10th Cir. 1998) (finding no supplemental jurisdiction over claims of class members below jurisdictional amount even though named plaintiff did have a claim in excess of \$75,000); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1337 (1998) (finding principle of *Stromberg* extended to class actions); *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928 (7th Cir. 1996) (holding supplemental jurisdiction appropriate over claim closely related to claim against defendants that is clearly permissible in the federal forum).

319. 205 F.3d 335 (7th Cir. 2000).

320. See *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071 (Ind. 1987).

321. *Judge*, 205 F.3d at 337.

322. *Bolt v. Loy*, 227 F.3d 854 (7th Cir. 2000) (before dismissing for a party's failure to respond to a motion, trial court should warn of dismissal sanction, either explicitly or by making clear that no further extensions of time will be granted); *Cash v. Ill. Div. of Mental Health*, 209 F.3d 854 (7th Cir. 2000) (holding that where time for motion for new trial expired, Rule 60(b) could not be used to correct error; it redresses only special circumstances justifying an extraordinary remedy); *CCC Info. Servs., Inc. v. Am. Salvage Pool Ass'n*, 230 F.3d 342 (7th Cir. 2000) (finding that when a not-for-profit corporation has a direct interest in the controversy, the corporation's citizenship controls for diversity, not the citizenship of the members); *Garcia v. Meza*, 235 F.3d 287 (7th Cir. 2000) (holding due process rights of owner violated in forfeiture proceeding where notice given by overnight delivery service); *Jessup v. Luther*, 227 F.3d 993 (7th Cir. 2000) (giving right of access to public information gave newspaper sufficient interest to intervene to contest sealing of record in wrongful termination case); *Kalis v. Colgate-Palmolive Co.*, 231 F.3d 1049 (7th Cir. 2000) (holding party not permitted to create issue of fact by submitting affidavit whose conclusions contradict prior deposition or other sworn testimony); *Lehmann v. Brown*, 230 F.3d 916 (7th Cir. 2000) (concluding that where claim alleges welfare-benefit plan committed tort and there is no parallel cause of action under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 (2000) (ERISA), action is not removable to federal court, even though state law claim may be preempted by ERISA); *Perry v. Globe Auto Recycling, Inc.*, 227 F.3d 950 (7th Cir. 2000) (finding assignee not precluded by prior litigation of assignor);



It is beyond the scope of this Article to canvas the myriad of cases emanating from the U.S. District Courts for the Northern and Southern Districts of Indiana affecting civil procedure. However, major litigation that will generate national attention has been situated in the U.S. District Court for the Southern District of Indiana. This stems from the Judicial Panel on Multi-District Litigation assigning the Bridgestone/Firestone tire litigation to Judge Sarah Evans Barker for pre-trial proceedings.

### C. Rules Changes

In December 2000, important amendments to the Federal Rules of Civil Procedure concerning discovery became effective. Moreover, additional changes to the rules are in the rulemaking process. The U.S. District Courts for the Northern and Southern Districts of Indiana have modified their Local Rules to conform to the newly amended federal rules.<sup>323</sup>

1. *Discovery*.—Ever since Federal Rule of Civil Procedure 26 was amended in 1993 to provide for automatic disclosures, there has been dispute over the success of the change.<sup>324</sup> Many federal courts took advantage of the opt-out provision of Rule 26(a),<sup>325</sup> so that automatic disclosure was not required in their jurisdictions. The possibility of opt-out has caused substantial disuniformity in federal discovery practice. At the same time, some believed that the scope of the information subject to automatic disclosure posed a substantial threat to both the attorney work product doctrine and material covered by the attorney-client privilege.<sup>326</sup> Effective December 1, 2000, Rule 26 and other discovery rules were amended to speak to these problems.

One commentator argues that the overarching purpose of amending the rules of discovery has been to make discovery an extra-judicial phenomenon.<sup>327</sup> To achieve this aim, the rules have been modified to establish specific guidelines of permissible discovery behavior.<sup>328</sup> Although, Rule 26 now mandates automatic disclosure in all federal actions, it also narrows the scope of

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Ramsden v. AgriBank, FCB, 214 F.3d 865 (7th Cir. 2000) (restricting power of federal courts to enjoin state court proceeding under the relitigation exception to the Anti-Injunction Statute); Tidemann v. Nadler Golf Car Sales, Inc., 224 F.3d 719 (7th Cir. 2000) (finding proper measure of costs for a prevailing defendant is determined by 28 U.S.C. §1920, not Federal Rule of Civil Procedure 68).

323. See H.R. Doc. No.106-228 (2000).

324. See generally Carl Tobias, A Progress Report on Automatic Disclosure in the Federal Courts, 154 F.R.D. 229 (1994).

325. See *id.*

326. See, e.g., Samuel Issacharoff & George Loewenstein, *Unintended Consequences of Mandatory Disclosure*, 73 TEX. L. REV. 753, 780-81 (1995); Linda S. Mullenix, *Adversarial Justice, Professional Responsibility, and the New Federal Discovery Rules*, 14 REV. LITIG. 13, 43-44 (1994).

327. See Hon. Elizabeth A. Jenkins, *Amendments to the Federal Discovery and Evidence Rules, A Primer*, 74 FLA. B.J. 22 (Dec. 2000).

328. See *id.*



permissible discovery for the first time since 1971.<sup>329</sup> Now, unless the court orders otherwise, the scope of discovery is restricted to nonprivileged information that is relevant to "the claim or defense of any party," instead of information that is relevant to the subject-matter of the action.<sup>330</sup> At the same time, automatic initial disclosure of specified information is mandatory.<sup>331</sup> Generally, automatic disclosure requires parties to identify without request each person with knowledge of and each document or similar item that bears on that party's claims or defenses, although the scope of insurance coverage and damages information that must be disclosed has not changed.

Automatic disclosures must be made at or within fourteen days of the Rule 26(f) planning meeting. This meeting can no longer be dispensed with by local rule, but it can take the form of a conference without an actual face-to-face encounter.<sup>332</sup> It must occur at least twenty-one days before any scheduling conference or any scheduling order is due. However, matters exempted from automatic disclosure requirements are also exempted from the planning conference.<sup>333</sup> Prior to these amendments, the U.S. District Courts for the Northern and Southern Districts of Indiana had operated under different policies on automatic disclosure; thus, the amendments bring a welcome possibility of increased uniform practice in our state's federal venues.<sup>334</sup>

Other important changes to the discovery process in federal courts involve depositions and sanctions. Now Federal Rule of Civil Procedure 30 sets an outer time limit for each deposition of one day of no more than seven hours, unless the court orders otherwise.<sup>335</sup> With regard to sanctions, amended Rule 37 provides that a court may sanction a party who fails to amend a prior response to discovery under Rule 26(e) by excluding the party's subsequent use of that evidence, unless there is substantial justification for the failure or it is harmless.<sup>336</sup>

2. *Technical Amendments.*—In addition to the changes in the discovery rules, a variety of nonsubstantive, technical amendments to Federal Rules of Procedure 4 (service of process on federal officials sued individually and in an official capacity), 5 (no filing of discovery until used in proceeding), 12 (sixty-day answer period for federal officers sued in individual capacity), and 14 (admiralty rule changes), also became effective December 1, 2000.<sup>337</sup>

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329. FED. R. CIV. P. 26(b)(1)(amended 2000). Up to this most recent amendment, Rule 26 had delineated the scope of discovery as nonprivileged information "relevant to the subject-matter of the action." FED. R. CIV. P. 26(b)(1).

330. FED. R. CIV. P. 26(b)(1)(amended 2000). Information concerning insurance coverage is still freely discoverable. *See id.*

331. *See* FED. R. CIV. P. 26(a)(1) (amended 2000).

332. FED. R. CIV. P. 26(b) (amended 2000); Fed. R. Civ. P. 26 (f) (amended 2000).

333. *Id.*

334. *See* Donna Stienstra, *Summary of Actions Taken by Federal District Courts in Response to Recent Amendments to Federal Rule of Procedure 26*, 154 F.R.D. LVII, LXVIII (1994).

335. *See* FED. R. CIV. P. 30 (amended 2000).

336. *See* FED. R. CIV. P. 37(c)(1) (amended 2000).

337. *See* Leonidas Ralph Mecham, Memorandum to the Chief Justice of the United States and



3. *Proposed Changes to the FRCP.*—Proposed changes to six Federal Rules of Civil Procedure have been submitted to the Judicial Conference for ultimate transmission to the Supreme Court. Rule 5(b) would allow for electronic service and service through court facilities.<sup>338</sup> To conform with this change, Rule 6(e) would also be amended to extend the time for response to documents so served for three days.<sup>339</sup> Following on the theme of technological innovation, Rule 77(d) would be modified to provide the clerk of the court with more alternatives for notifying parties of entry of an order or judgment, including facsimile and computer transmission. Rule 65 would add a new subdivision (f) to govern copyright impoundment.<sup>340</sup> Finally, Rule 81(a)(1) would be changed to clarify that the Federal Rules of Civil Procedure apply in bankruptcy proceedings, mental health proceedings, and copyright proceedings.<sup>341</sup>

The Advisory Committee has also recommended that proposed changes to rules 7, 54, 58 and 81 be published.<sup>342</sup> New rule 7.1 would be added and would require the disclosure of corporate parties' financial interests, including the disclosure of parent corporations and stock interests of at least 10% held by public corporations.<sup>343</sup> Rule 58 will be changed to remove a conflict with Federal Rule of Appellate Procedure 4, governing when the time runs for filing an appeal.<sup>344</sup> The amendments would make it clear that, except for final orders under Rules 50(b), 52(b), 54(d)(2)(B), 59, and 60, all judgments—even amended ones—must be entered on a separate document.<sup>345</sup> To be consistent with these changes, Rule 54 would also be amended to delete the requirement of service before the submission of a motion for attorneys fees and to delete the requirement of a separate judgment therefor.<sup>346</sup>

4. *Local Rules.*—Effective October 2, 2000, a number of Local Rules of the

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the Associate Justices of the Supreme Court (Oct. 20, 2000), *available at* <http://www.uscourts.gov/rules/supcivil.pdf> (last visited May 10, 2001).

338. Proposed FED. R. CIV. P. 5(b), *available at* <http://www.uscourts.gov/rules/0010CVredlinetext.pdf> (last visited May 10, 2001).

339. Proposed FED. R. CIV. P. 6(e), *available at* <http://www.uscourts.gov/rules/0010CVredlinetext.pdf>.

340. Proposed FED. R. CIV. P. 65, *available at* <http://www.uscourts.gov/rules/0010CVredlinetext.pdf>.

341. Proposed FED. R. CIV. P. 81(a)(d), *available at* <http://www.uscourts.gov/rules/0010CVredlinetext.pdf>.

342. Transmittal Memorandum of the Committee on Rules of Practice and Procedure of the U.S. Judicial Conference, *at* <http://www.uscourts.gov/rules/comment2001/memoranda.htm>. The full text of the proposed rules is available at <http://www.uscourts.gov/rules/comment2001/amendments/cv.pdf> (last visited May 10, 2001).

343. *See* Report of the Civil Rules Advisory Committee to Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure (May 2000), *available at* <http://www.uscourts.gov/rules/comment2001/summary.pdf> (last visited May 10, 2001).

344. *See id.*

345. *See id.*

346. *See id.*



U.S. District Court for the Northern District of Indiana were revised.<sup>347</sup> Among the more important changes were amendments to Local Rules 5.1(d)<sup>348</sup> (prohibiting transmission of papers for filing to the judge, not the Clerk of the Court); 7.1(b)<sup>349</sup> (requiring the separate filing of motions and that alternative motions be listed in caption); 8.2<sup>350</sup> (new rule regarding corporate disclosures); 16.3<sup>351</sup> (requiring that attorneys consult with clients before requesting continuances); 30.1<sup>352</sup> (new rule for scheduling depositions); 54.1<sup>353</sup> (requiring taxation of costs on prescribed form); 56.1<sup>354</sup> (extending time for filing affidavits or other documents in opposition to summary *judgment* to thirty, instead of fifteen, days—reply to opposition due in fifteen days); and 83.5 (b) and (g)<sup>355</sup> (requiring attorneys and pro se litigants to certify to having read the Local Rules before admission to practice).

The U.S. District Court for the Southern District of Indiana has also effectuated changes to certain of its Local Rules. Effective January 1, 2001, Local Rule 53.1 on arbitration and alternative dispute resolution was deleted.<sup>356</sup> In addition, as of that date, Local Rule 16.1, governing pre-trial conferences and other judicial management proceedings has been amended to conform to the changes in the Federal Rules of Civil Procedure and to affect time limits for conduct of such proceedings, as well as other changes.<sup>357</sup> Other modifications include moving 26.1 (b), limiting the number of interrogatory questions, to Rule 36.1; deleting 26.2(d), affecting the filing of discovery material and motions to publish depositions; deleting entirely Rule 26.3, exempting compliance with the Federal Rules of Civil Procedure; deleting subsections (a) and (d) of 30.1, which had regulated attorney objections during depositions; 42.2, governing the procedure on case consolidation, and 83.5 dealing with bar admission.<sup>358</sup> Finally, a new fee schedule for the Southern District went into effect as of January 1, 2001.<sup>359</sup>

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347. The text of the amended Local Rules for the U.S. District Court for the Northern District of Indiana is available at <http://www.innd.uscourts.gov/docs/notice.pdf> (last visited May 10, 2001).

348. See Local Rule, N.D. Ind., 5.1(b) (amended 2000).

349. Local Rule, N.D. Ind., 7.1(b) (amended 2000).

350. Local Rule, N.D. Ind., 8.2 (amended 2000).

351. Local Rule, N.D. Ind., 16.3 (amended 2000).

352. Local Rule, N.D. Ind., 30.1 (amended 2000).

353. Local Rule, N.D. Ind., 54.1 (amended 2000).

354. Local Rule, N.D. Ind., 56.1 (amended 2000).

355. Local Rule, N.D. Ind., 83.5 (amended 2000).

356. The full text of the Local Rules for the U.S. District Court for the Southern District of Indiana as amended is available at <http://www.insd.uscourts.gov/publications.htm> (last visited May 29, 2001).

357. Local Rule, S.D. Ind., 16.1 (amended 2001).

358. Local Rules, S.D. Ind., 26 (amended 2000), 30.1 (amended 2000), 42.2 (amended 2000), 83.5 (amended 2000), at <http://www.insd.uscourts.gov/rules/adr.pdf> (last visited May 10, 2001).

359. The full schedule of fees is available at [http://www.insd.uscourts.gov/insd\\_fees.pdf](http://www.insd.uscourts.gov/insd_fees.pdf) (last visited May 10, 2001).



# **SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW**

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## **INTRODUCTION**

During this survey period,<sup>1</sup> the courts published far fewer automobile insurance opinions than in past years and significantly more commercial liability opinions. There were fewer than expected cases dealing with claims against insurers for breach of duty of good faith. Nevertheless, for the first time in Indiana, a federal court, predicting what Indiana courts would do, allowed for the possibility of an award of damages for emotional distress and recovery of attorney fees in a bad faith lawsuit.

In general, the courts continued to value the freedom of the parties to establish their rights in contracts even in the insurance setting, with only one exception. If an ambiguity exists in the contract, either with respect to contract terms or as a result of the insurer's conduct, the courts will work hard to extend coverage to the insured. Despite Indiana's strict enforcement of the contract terms as written, courts endeavor to protect innocent victims by seeking to find a means by which coverage can be extended to them. This Article addresses the past year's cases and analyzes their effect on the practice of insurance law.

## **I. COMMERCIAL AND PROPERTY INSURANCE CASES**

### ***A. Intentional Acts Exclusion***

During this survey period, several cases examined the intentional acts exclusion contained in insurance policies covering general commercial liability and agribusiness. Interestingly, all of the "intentional act" exclusion cases involved the issue of whether an insured could recover for losses caused by the firing of a gun on the insured's property. Of course, each case focused on whether the shooting was intentional and, thus, excluded under the policy. In one case, the court found the shooting intentional and denied coverage.<sup>2</sup> In the second case, the court found the shooting was not intentional, thereby allowing for coverage.<sup>3</sup> In the third case, the court did not rule on whether the shooting was intentional, but rather held that the insured was collaterally estopped from re-litigating his intent after he was convicted for the shooting in his criminal

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1. The survey period for this Article is approximately October 1, 1999 to September 30, 2000.

2. See *Sans v. Monticello Ins. Co.*, 718 N.E.2d 814, 820-21 (Ind. Ct. App. 1999).

3. See *Stout v. Underhill*, 734 N.E.2d 717, 721 (Ind. Ct. App. 2000).



trial.<sup>4</sup>

In *Sans v. Monticello Insurance Co.*,<sup>5</sup> the liability insurer for the Tic Tock Lounge sought a declaratory judgment stating that it owed no coverage to the lounge and its bartender for an unruly patron's lawsuit under the assault and battery exclusion.<sup>6</sup> The patron's lawsuit against both the lounge and the bartender sought recourse for personal injuries, contending that the bartender carelessly and negligently shot him following an altercation.<sup>7</sup>

On the night of the shooting, the bartender, who also served as security in the bar, placed a pistol on top of the bar in the customers' plain view in an effort to keep the peace. At some point during the evening, a patron came into the bar and began drinking heavily. The patron became intoxicated and grew increasingly belligerent. In response to the patron's obvious intoxication, the bartender refused to serve him more alcohol. After the patron attempted to grab someone else's drink, the bartender and the patron exchanged words and began to wrestle, until the bartender pushed the patron out of the bar. The patron returned and the fighting continued until the bartender expelled him a second time. During the altercation, the bartender grabbed the gun and pointed it at the patron trying to frighten him into submission. The bartender knew the gun was loaded when he cocked it and placed a bullet in the chamber of the pistol. When the patron entered the bar for the third time, the bartender approached the door, raised the pistol and fired into the unarmed patron's forehead from about two to three feet away.<sup>8</sup>

The appellate court had previously refused to rule, as a matter of law, that the shooting was intentional to support summary judgment for the insurer on the application of the "intentional acts" exclusion.<sup>9</sup> At trial, the lower court weighed the evidence and concluded that the shooting was intentional, thereby excluding coverage.<sup>10</sup>

In determining whether the shooting was intentional, the court of appeals considered the bartender's expansive experience and familiarity with firearms. The court further determined that at the time of the shooting, the bartender was not under the influence of drugs or alcohol, he was not distracted or bumped, he

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4. See *Meridian Ins. Co. v. Zepeda*, 734 N.E.2d 1126, 1130 (Ind. Ct. App. 2000).

5. See *Sans*, 718 N.E.2d at 814.

6. See *id.* The intentional acts exclusion in the policy, which was entitled the "assault and battery exclusion," read in pertinent part:

It is agreed that the insurance does not apply to bodily injury or property damage arising out of assault & battery or out of any act or omission in connection with the prevention or suppression of such acts, whether caused by or at the instigation or direction of the insured, his employees, patrons or any other person.

*Id.* at 817 n.7.

7. See *id.* at 817.

8. See *id.*

9. See *Sans v. Monticello Ins. Co.*, 676 N.E.2d 1099 (Ind. Ct. App. 1997).

10. See *Sans*, 718 N.E.2d at 818.



did not drop the gun, and the gun did not malfunction.<sup>11</sup> All of these facts led the court to enter judgment in favor of the insurance company and against the bartender.<sup>12</sup>

The second "intentional acts" case involved a shooting of a trespasser on the insured's land. In *Stout v. Underhill*,<sup>13</sup> the insured owned 300 acres of land on which yellow root grew naturally. The insured caught a trespasser digging yellow root on his property and ordered the trespasser to walk to the road under gunpoint until the game warden arrived. Two weeks later, the trespasser was again caught by the insured digging yellow root. On this occasion, as the insured walked with the trespasser to the road, the trespasser ran. The insured fired three shots from approximately 120 feet in the trespasser's direction. At trial, the insured insisted that he was not trying to shoot the trespasser, while the trespasser claimed it was intentional.<sup>14</sup>

At trial, the insurer stressed the facts of the case to rebut the insured's assertion that the shooting was unintentional. The insurer argued that the insured either intended to injure the trespasser or at least demonstrated an expectation by the insured that injuries were certain to occur.<sup>15</sup> However, the trial court concluded that the exclusion did not apply, as the insured neither intended nor expected the injuries to occur.<sup>16</sup>

On appeal, the court refused to reweigh the evidence and affirmed.<sup>17</sup> In so doing, the court made an interesting comment about the effect of its decision:

We share [the insurer's] concern that our holding may allow an insured to shoot someone and then simply say, "I didn't mean to hit him," in order to obtain coverage. Currently, and under our holding in this case, the "I didn't mean to" defense is a credibility issue left to resolution by the fact finder at trial. Without question, firearms are dangerous weapons and aiming and firing a gun in the general vicinity of another person (or, as in this case, within ten feet of a person) is a dangerous act. However, we disagree with [the insurer's] assertion that "[a]cquisition [sic] to this conduct is tantamount to the court rewriting the policy to delete the [intentional act] exclusion and has the effect of destroying the

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11. *See id.* at 820.

12. *See id.* at 821.

13. 734 N.E.2d 717 (Ind. Ct. App. 2000).

14. *See id.* at 718-19.

15. Under the policy exclusion, coverage was not offered for injuries or damages "intended or expected" by the insured. *Id.* at 719. It is important to observe that different standards apply to each. "Intentional" refers to "the volitional performance of an act with an intent to cause injury, although not necessarily the precise injury or severity of damage that in fact occurs." *Allstate Ins. Co. v. Herman*, 551 N.E.2d 844, 845 (Ind. 1990). The term "expected" means the insured was "consciously aware that the injury was practically certain to result. *Bolin v. State Farm Fire & Cas. Co.*, 557 N.E.2d 1084, 1086 (Ind. Ct. App. 1980).

16. *See Stout*, 734 N.E.2d at 721.

17. *See id.*



public policy of this State to not permit insurance for intentional wrongs.<sup>18</sup>

The court also invited the insurer to seek transfer for resolution by the Indiana Supreme Court.<sup>19</sup>

In the third case, *Meridian Insurance Co. v. Zepeda*,<sup>20</sup> the court did not have to consider the facts of the shooting in determining that the insured was bound by the jury's finding that the shooting was intentional.<sup>21</sup> Simon Zepeda, who shot Ernest King with a .22 caliber rifle, was convicted of aggravated battery. A week before Zepeda's conviction, King filed a personal injury action against Zepeda claiming that he negligently discharged the rifle causing King's injuries.<sup>22</sup>

Zepeda's insurer defended him under a reservation of rights and filed a declaratory judgment action alleging that because Zepeda had been convicted of the shooting, the policy excluded coverage under the "intentional acts" exclusion. The insurer argued that both Zepeda and King were collaterally estopped from litigating whether Zepeda's conduct in the shooting was intentional because the criminal jury in Zepeda's case necessarily found the shooting intentional in order to convict Zepeda for aggravated battery.<sup>23</sup>

The court, analyzing principles of collateral estoppel, found Zepeda's conviction to be a finding that the shooting was intentional.<sup>24</sup> However, this finding was only binding on Zepeda, not King, so only Zepeda was collaterally estopped from re-litigating whether the shooting was intentional.<sup>25</sup> Because King was not a party to the criminal case and did not have a full and fair opportunity to litigate the issue of Zepeda's intent, he was not estopped from litigating Zepeda's intent in the personal injury action.<sup>26</sup> The court recognized that its holding could create "potentially inconsistent determinations of fact," but it did not want to deprive King of his day in court.<sup>27</sup>

These three shooting cases expand upon a long line of decisions addressing the "intentional acts" exclusion.<sup>28</sup> They are significant in demonstrating that insurance companies will have a much harder time enforcing the "intentional acts" exclusion. By allowing an insured to simply say "I didn't mean to cause the injury," courts will almost always find an issue of fact to prevent summary

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18. *Id.*

19. *See id.*

20. 734 N.E.2d 1126 (Ind. Ct. App. 2000).

21. *See id.* at 1128.

22. *See id.*

23. *See id.* at 1128-29.

24. *See id.* at 1130.

25. *See id.* at 1131-32.

26. *See id.*

27. *Id.* at 1132.

28. Many of these cases are cited in the *Stout* decision where the court sought guidance in the definitions of the terms and facts for comparison. *See Stout v. Underhill*, 734 N.E.2d 717, 719 (Ind. Ct. App. 2000).



judgment. Thus, more of these cases will be resolved via trial. Insurers must also be prepared to show, by overwhelming evidence, that the insured's conduct refutes the assertion that the injuries were unintentional.

*B. Emotional Distress Damages and Attorney Fees Available in Bad Faith Cases*

In a case of first impression in Indiana, the United States District Court for the Northern District of Indiana predicted that Indiana courts would allow plaintiffs to recover damages for emotional distress, attorney fees and consequential damages in bad faith insurance cases.<sup>29</sup> In *Patel*, the Patels brought suit against their insurance companies seeking coverage for losses they sustained when their restaurant and motel burned down. The authorities found the fire to be a result of arson. After investigating the circumstances surrounding the fire, the insurance companies denied coverage to the Patels based upon their belief that the Patels started the fire themselves.<sup>30</sup>

While the Patels' lawsuit was pending, the Fort Wayne Police Department found the individual who started the fire that destroyed the Patels' property. Upon learning of the confession, one of the insurers paid the loss claim, plus interest. However, the insurer refused to pay the consequential damages sought by the Patels as a result of the delay in the payment of their claim, such as lost rents from the motel and lost profit from the restaurant.<sup>31</sup>

In their bad faith lawsuit against the insurer, the Patels sought damages for emotional distress associated with the insurer's alleged bad faith denial of coverage as well as punitive damages and attorney fees.<sup>32</sup> The district court was barraged with motions from both sides asking the court to determine as a matter of law whether the Patels were entitled to pursue damages for emotional distress, lost profits and attorney fees as part of their bad faith claim against the insurer.

The court acknowledged that no prior Indiana court had decided these issues.<sup>33</sup> Citing *Erie Insurance Co. v. Hickman*<sup>34</sup> and *Firstmark Standard Life Insurance Co. v. Goss*,<sup>35</sup> the court noted that Indiana courts previously presented with this issue resolved the cases on other grounds, thereby avoiding the emotional distress damages issue.<sup>36</sup>

The court initially determined that it was not procedurally allowed to address whether the Patels were entitled to pursue consequential damages in their bad faith action.<sup>37</sup> The court was presented with the Patels' motion to reconsider its

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29. *Patel v. United Fire & Cas. Co.*, 80 F. Supp. 2d 948 (N.D. Ind. 2000).

30. *See id.* at 951.

31. *See id.*

32. *See id.*

33. *See id.* at 952.

34. 622 N.E.2d 515 (Ind. 1993).

35. 699 N.E.2d 689 (Ind. Ct. App. 1998).

36. *See Patel*, 80 F. Supp. 2d at 952.

37. *See Patel v. United Fire & Cas. Co.*, 80 F. Supp. 2d 948, 953 (N.D. Ind. 2000).



prior order denying the Patels recovery for consequential damages. Because no new facts or law were presented in their motion, it was not proper for the court to reconsider its prior ruling. Faced with this ruling, the Patels urged the court to treat their motion to reconsider as a motion to certify to the Indiana Supreme Court the issue of whether they could recover consequential damages in either their breach of contract claim or their bad faith claim.<sup>38</sup> The court refused to certify the issue because certain requirements were not present.<sup>39</sup> Thus, the district court did not decide whether the Patels could recover consequential damages because it was not procedurally proper to do so.

In analyzing the Patels' ability to seek damages for emotional distress in their bad faith action, the court looked for guidance in *Erie*:

In tort, all damages directly traceable to the wrong and arising without an intervening agency are recoverable. By contrast, the measure of damages in a contract action is limited to those actually suffered as a result of the breach which are reasonably assumed to have been within the contemplation of the parties at the time the contract was formed. Nonetheless, in most instances, tort damages for the breach of the duty to exercise good faith will likely be coterminous with those recoverable in a breach of contract action.<sup>40</sup>

The insurer argued that this language in *Erie* meant that tort damages in bad faith actions were limited to the same types of damages recoverable in contract actions. The Patels argued that *Erie* meant to allow for recovery of all damages directly traceable to the wrong, thereby expanding the types of damages recoverable in a bad faith tort action. Consequently, the Patels urged they should be allowed to recover emotional distress damages.<sup>41</sup>

The court impliedly adopted the Patels' reading of *Erie* and addressed whether the Patels could maintain an emotional distress cause of action under Indiana law. Specifically, the court determined that the modified impact rule enunciated in *Shuamber v. Henderson*<sup>42</sup> applied to this emotional distress case.<sup>43</sup> Because it was undisputed that there was no impact, the Patels could not satisfy the modified impact rule. To be successful, the Patels had to fit their case into the intentional tort exception explained in *Cullison v. Medley*.<sup>44</sup> That is, the Patels' ability to recover emotional distress damages in their bad faith claim hinged on whether bad faith was an intentional tort under Indiana law.<sup>45</sup>

The court acknowledged that there were no Indiana cases specifically addressing whether bad faith was an intentional tort: "Perhaps this is because the

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38. See *id.*

39. See *id.* at 954.

40. *Id.* at 956 (citing *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515, 519 (Ind. 1993)).

41. See *id.*

42. 579 N.E.2d 452, 455-56 (Ind. 1991).

43. See *Patel*, 80 F. Supp. 2d at 957-59.

44. 570 N.E.2d 27 (Ind. 1991).

45. See *Patel*, 80 F. Supp. 2d at 957-58.



tort of bad faith, as defined in Indiana, is a hybrid cause of action, sharing elements of both a negligence action and one for an intentional tort."<sup>46</sup> Nevertheless, the court predicted that the "Indiana Supreme Court would consider the tort more closely aligned with the principles underlying an intentional tort than with those ascribed to negligence."<sup>47</sup> In so doing, the court found that the Patels' bad faith claim could satisfy the intentional tort exception to permit a claim for emotional distress damages.<sup>48</sup>

Next the court considered whether the Patels may recover attorney fees if they were successful in their bad faith action. First, the court examined whether the common law allowed for an attorney fee award in bad faith cases. The court noted the existence of the long standing "American rule" generally requiring each party, absent agreement, statute or rule to the contrary, to pay its own fees.<sup>49</sup> Urging an exception to the "American rule," the Patels cited to dicta in *Mikel v. American Ambassador Casualty Co.*,<sup>50</sup> suggesting that bad faith cases present an exception to the "American rule." However, the court refused to adopt *Mikel's* dicta and found that attorney's fees would not be recoverable in bad faith cases as a matter of common law.<sup>51</sup>

Nonetheless, the court also looked to whether Indiana Code section 34-52-1-1(b)(3) provided for attorney's fees if the Patels prevailed on their bad faith claim.<sup>52</sup> This statute provides for an award of attorney's fees to the prevailing party if there is a finding that the other party "litigated the action in bad faith."<sup>53</sup> The court found that bad faith conduct which takes place prior to the filing of the lawsuit can be considered litigating in bad faith, thus making attorney fees recoverable.<sup>54</sup> The court, however, noted that while attorney fees are recoverable, the decision to award them lies within the discretion of the trial court.<sup>55</sup> Therefore, "not every finding of bad faith conduct will necessarily subject an insurer to liability for its insured's attorney's fees."<sup>56</sup>

It is important to note that this decision represents a federal district court predicting what the Indiana Supreme Court would do if faced with this question. Whether the Indiana Supreme Court will agree remains a matter to be addressed in the future. Nonetheless, the district court decision is logically sound. Because a claim for bad faith requires an element of "conscious wrongdoing,"<sup>57</sup> permitting

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46. *Id.* at 958.

47. *Id.*

48. *See id.* at 958-60.

49. *See id.* at 960.

50. 644 N.E.2d 168 (Ind. Ct. App. 1994).

51. *See Patel*, 80 F. Supp. 2d at 961.

52. *See id.* at 961-63.

53. *See* IND. CODE § 34-52-1-1(b)(3) (2000).

54. *See Patel*, 80 F. Supp. 2d at 961-62 (citing *Mitchell v. Mitchell*, 695 N.E.2d 920, 922 (Ind. 1998)).

55. *See id.* at 963.

56. *Id.*

57. As stated by the court in *Colley v. Indiana Farmers Mutual Insurance Group*, 691



recovery of emotional distress damages is consistent with Indiana law allowing such damages for intentional conduct. However, such damages should not be recoverable if the insurance company merely breached the policy. Instead, the tort of bad faith must be proven.

*C. Lack of Timely Notice of Claim Resulted in No Coverage*

Two cases during this survey period examined situations in which the insured failed to give timely notice of a claim or lawsuit to the insurer, and the courts found no duty to defend or indemnify as a result of the untimely notice. The first case, *Askren Hub States Pest Control Services, Inc. v. Zurich Insurance Co.*,<sup>58</sup> analyzed the insured's notice obligations in the context of a general commercial liability policy, while the second case, *Paint Shuttle, Inc. v. Continental Casualty Co.*,<sup>59</sup> analyzed the notice requirement in the context of a legal malpractice policy. Both cases stand for the proposition that notice to the insurer is not timely if the delay prejudices the insurer, either presumably or actually, from conducting its own investigation and building its own defense. Obviously, this is a very fact-sensitive inquiry.

In *Askren*, a pest control company was sued for negligence arising out of a termite inspection.<sup>60</sup> The exterminator waited six months to notify its insurer of the claim against it. In the interim, the insured conducted multiple inspections, communicated with the customer, and made remedial repairs without notifying the insurer. As a result, the insurer argued that it was prejudiced by the delay in notice and sought to deny coverage, relying on the notice provisions in the policy.<sup>61</sup>

The court indicated that under Indiana law, a liability insurer's ability to prepare an adequate defense is presumptively prejudiced when there is an unreasonable delay in notification of a claim.<sup>62</sup> In this case, the court found that the six month delay prejudiced the insurance company and coverage was denied.<sup>63</sup> The delay caused the insurer to be unable to conduct an investigation into whether Askren's initial termite inspection was erroneous and caused the homeowner's alleged damage.<sup>64</sup>

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N.E.2d 1259, 1261 (Ind. Ct. App. 1998), "[p]oor judgment or negligence do not amount to bad faith; the additional element of conscious wrongdoing must also be present."

58. 721 N.E.2d 270 (Ind. Ct. App. 1999).

59. 733 N.E.2d 513 (Ind. Ct. App. 2000).

60. See *Askren*, 721 N.E.2d at 273-74.

61. See *id.* at 277.

62. See *id.* at 278.

63. See *id.* at 280. The court's finding of prejudice was based on the fact that Askren did not preserve any of the portions of the home that had been infested by termites, and later replaced. See *id.* Askren failed to photograph the damaged portions of the home before making repairs and treated the home, which eliminated the termites from the residence. See *id.*

64. See *id.*



In *Paint Shuttle*, a law firm was sued for malpractice.<sup>65</sup> A partner in the law firm orally notified the firm's insurance agent of the suit several weeks after suit was filed. The law firm undertook to defend itself in the motion phase of the lawsuit, but eventually hired outside counsel to represent it at trial. Later, the client obtained a \$1.4 million judgment against the law firm. Over two years after the lawsuit was filed, and after judgment was already entered against it, the law firm finally notified its insurance company in writing that it had been sued for malpractice. This notice was sent at the same time the law firm filed a declaratory judgment action against the insurer to recover under the malpractice policy.<sup>66</sup>

The malpractice policy was effective for the term of November 29, 1993 through November 29, 1994, a definitive policy period which included the date the lawsuit was filed, and included an undisclosed extended reporting period.<sup>67</sup> The policy was a "claims made" policy as opposed to an "occurrence" policy.<sup>68</sup>

The notice provisions in the policy required the law firm to notify the agent and the insurance company in writing of any claim made against the firm "during the policy term or extended reporting period."<sup>69</sup>

The court concluded that the law firm made a conscious decision to defend against the lawsuit without notifying the insurance company. As a result, the court found that the law firm failed to provide timely notice, and that the delay in notice resulted in prejudice to the insurer.<sup>70</sup>

#### *D. Insurer's Conduct May Waive One-Year Statute of Limitations Contained in the Policy*

Two cases were decided during this survey period that addressed an issue that frequently surfaces concerning contractual time limitations on an insured's ability to sue an insurance company for breach of the policy. In *Auto-Owners Insurance Co. v. Cox*,<sup>71</sup> and *Summers v. Auto-Owners Insurance Co.*,<sup>72</sup> the court of appeals analyzed whether the insurer's conduct waived the twelve-month limitation on the insured's ability to sue. In both *Cox* and *Summers*, the policies

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65. See 733 N.E.2d 513, 518 (Ind. Ct. App. 2000).

66. See *id.* at 518-20.

67. See *id.* at 517.

68. See *id.* at 522. The court explained the difference between "claims made" and "occurrence" policies. "A 'claims made' policy links coverage to the claim and notice rather than injury." *Id.* This type of policy is designed to protect the holder only against claims made during the policy term. An "occurrence" policy links "coverage to the date of the tort rather than of the suit." *Id.* Occurrence policies protect the holder from liability for any act done during the policy term. Because the policy in this case was a "claims made" policy, notice during the policy term was critical to the court's decision of the coverage issues. See *id.*

69. *Id.* at 519.

70. See *id.* at 521.

71. 731 N.E.2d 465 (Ind. Ct. App. 2000).

72. 719 N.E.2d 412 (Ind. Ct. App. 1999).



required the insured to file a lawsuit within one year of the date of loss.<sup>73</sup> In both cases the court of appeals recognized that the insurer, by its conduct, can waive the twelve-month limitations period.<sup>74</sup> In *Summers*, the court found that the insurer did not waive the twelve-month limitations period, but in *Cox*, the court found the insurer did waive the limitations period. The following is a discussion of the dispositive facts in each case.

In *Summers*, the insured suffered a loss from a theft<sup>75</sup> and informed the insurer of the loss approximately two weeks later. As part of its investigation, the insurer sent several forms to the insured, who returned them completed a month and a half later. Two months later, the insurer requested an examination under oath and various other documents from the insured. The insured's attorney agreed to the examination, but failed to cooperate in getting it scheduled until more than eight months after the theft. At the time of the examination under oath, the insured refused to authorize the release of his tax records to the insurer and refused to sign the transcript of his examination under oath. Nearly six months later, the insured's attorney contacted the insurance company claiming that there were discrepancies in the transcript of the examination under oath. At that time, the insurer notified the insured's attorney in writing that the twelve-month limitations provision in the policy applied to time-bar the insured's claim.<sup>76</sup>

In *Cox*, the insured suffered roof damage during an ice storm on March 12, 1991.<sup>77</sup> She immediately notified her agent who sold her the homeowners' policy. Later that month, a repair crew was sent to work on her roof, but the repairs did not completely fix the damage. The insured continued to complain of roof problems, but the agent stalled in making the repairs. As time passed, the roof continued to sag. Almost eighteen months later, the insured reported the badly sagging roof to her agent again. The agent finally reported the loss to the insurer on September 23, 1992, listing storm damage as the cause of the damage. The insurer denied the claim citing the twelve-month limitations provision.<sup>78</sup>

The court of appeals in *Cox* relied on the analysis in *Summers*. Comparing the facts, the *Cox* court explained that in *Summers* the insurer "did not waive the limitations period, but instead repeatedly sought to enforce the policy requirements in the face of noncompliance by the insured."<sup>79</sup> In *Cox*, the court was persuaded by the facts that the insured immediately notified her agent of the storm damage and that negotiations between the agent and the insured were

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73. The policy language was the same in both cases: "We may not be sued unless there is full compliance with all the terms of this policy. Suit must be brought within one year after the loss or damage occurs." *Cox*, 731 N.E.2d at 468; *Summers*, 719 N.E.2d at 415.

74. See *Cox*, 731 N.E.2d at 467-68; *Summers*, 719 N.E.2d at 415.

75. See *Summers*, 719 N.E.2d at 413.

76. See *id.* at 413-14.

77. See *Cox*, 731 N.E.2d at 466.

78. See *id.*

79. *Id.* at 468.



actively ongoing.<sup>80</sup>

The court found that the insured's repeated contact with the agent could lead a reasonable person to infer that "filing suit to collect on the claim was not being insisted upon."<sup>81</sup> In emphasizing the difference between the two cases, the court enunciated that as a general rule, the insurer has no duty to inform the insured of his rights and obligations under the policy.<sup>82</sup> However, where an insurer "does not deny coverage or liability, and proceeds to negotiate . . . toward settlement . . . the law will imply a waiver of the contractual limitation . . . unless and until the insurer puts the insured on notice that litigation is necessary if he desires to pursue the claim further."<sup>83</sup>

So, while *Cox* and *Summers* come to different results, they are consistent because they adhere to the same framework of Indiana law. Courts will generally uphold a contract provision that reduces the statutory limitations period.<sup>84</sup> The insurer's conduct, however, must be reviewed to see if the limitation is waived.

#### *E. Adequate Notice of Cancellation of Policy by Insurer*

In *Westfield Co. v. Rován, Inc.*,<sup>85</sup> the court was faced with an issue of first impression in Indiana as to whether an insurer gave adequate notice of cancellation of an endorsement to an insurance policy. The court ultimately held that cancellation of a portion of a policy is the same as cancellation of the entire policy and therefore the same procedures must be followed.<sup>86</sup>

In *Rován*, Cheryl Robinson was the president of Rován, Inc., a company in the business of repairing and renovating automobiles and recreational vehicles. Ms. Robinson, on behalf of Rován, Inc., obtained a commercial package of insurance coverage, which included a commercial auto policy.<sup>87</sup> In January 1998, Rován, through Ms. Robinson, entered into a lease agreement with Ms. Robinson's son, Brandon, for the lease of a 1995 Chevy pickup truck. As part of the agreement, Rován was required to provide direct primary coverage for Brandon when he drove the 1995 Chevy. Pursuant to the lease agreement, Ms. Robinson notified Rován's insurance agent of the lease agreement and requested coverage for Brandon. The insurer issued an Amended Common Policy Declaration adding to it a Lessor Endorsement. The Lessor Endorsement

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80. *See id.*

81. *Id.*

82. *See Summers*, 719 N.E.2d at 416 (citing *Statesman Ins. Co. v. Reibly*, 371 N.E.2d 414, 416, n.4 (Ind. Ct. App. 1978)).

83. *Id.* (quoting *Schafer v. Buckeye Union Ins. Co.*, 381 N.E.2d 519, 523 (Ind. Ct. App. 1978)) (emphasis added).

84. *See, e.g., United Tech. Auto. Sys., Inc. v. Affiliated FM Ins. Co.*, 725 N.E.2d 871 (Ind. Ct. App. 2000) (enforcing twelve month statute of limitations provision in environmental insurance contract).

85. 722 N.E.2d 851 (Ind. Ct. App. 2000).

86. *See id.* at 858.

87. *See id.* at 853-54.



provided coverage for Brandon as an additional insured under the Common Policy when driving a vehicle owned by Brandon, but leased to Rován.<sup>88</sup>

In March 1998, Brandon, with permission from Rován, sold the Chevy pickup and bought a 1998 Ford Mustang. Another written lease agreement was executed with the same terms as the agreement involving the Chevy pickup. Ms. Robinson notified the insurance agent of the replacement and requested coverage for the Mustang. However, she did not send a copy of the new lease agreement to the insurer. The insurer acknowledged the replacement and issued another Amended Common Policy Declaration and, unbeknownst to Rován, deleted the Lessor Endorsement.<sup>89</sup>

On June 8, 1998, Brandon sold the Mustang and purchased a 1997 Dodge pickup. Rován and Brandon orally agreed that the Dodge would replace the Mustang under the same terms of the existing lease agreement. Ms. Robinson immediately notified the insurance agent of the replacement vehicle and requested coverage for the Dodge.<sup>90</sup>

A few days later, Brandon was in a serious accident while driving the Dodge pickup and requested coverage for the loss. The insurer filed a declaratory judgment action stating that the policy did not cover Brandon's liability because the Lessor Endorsement had been deleted. Rován argued that the Lessor Endorsement would have covered the Dodge had it not been deleted, and the insurer canceled the coverage without providing sufficient notice.<sup>91</sup>

First, the court analyzed whether the Dodge would have been covered had the endorsement not been deleted.<sup>92</sup> The Lessor Endorsement covered any leased auto listed in the policy. The term "leased auto" was defined as "an 'auto' leased or rented to you, including any substitute, replacement or extra 'auto' . . . under a leasing or rental agreement that requires you to provide direct primary insurance for the lessor."<sup>93</sup> Interpreting the plain language of the endorsement, the court traced coverage to the Dodge as a replacement vehicle leased to Rován under a leasing agreement requiring Rován to provide direct primary insurance for the lessor.<sup>94</sup> The court found that the Lessor Endorsement was not vehicle specific, but rather covered any auto listed in the policy and subject to a lease agreement.<sup>95</sup>

After concluding that there would have been coverage if the insurer had not deleted the endorsement, the court analyzed whether the insurer properly notified the insured of the Lessor Endorsement deletion. Specifically, the court asked, "what and how much notice of cancellation by the insurer is sufficient to

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88. *See id.* at 854.

89. *See id.*

90. *See id.*

91. *See id.* at 855.

92. *See id.* at 856-67.

93. *Id.* at 856.

94. *See id.* at 857.

95. *See id.*



effectively cancel an insurance policy.”<sup>96</sup> The court looked to both Indiana statutory law as well as the policy language to determine what cancellation procedures the insurer was required to follow. Finding no statute or policy language governing cancellation, the court turned to common law for guidance.<sup>97</sup>

The court explained that “generally in the absence of a specific statutory or policy provision, any form of notice of cancellation is sufficient.”<sup>98</sup> The court added that the “notice must positively and unequivocally inform the insured of the insurer’s intention that the policy cease to be binding.”<sup>99</sup> The court concluded that the insurer was required to “positively and unequivocally” inform Rován of its intention that the policy no longer be binding.<sup>100</sup>

When the insurer issued the Amended Common Policy, it sent Rován a document which stated: “This endorsement changes your policy. Please attach it to your original policy.”<sup>101</sup> The court found that this cryptic explanation did not provide unequivocal notice of what was actually being deleted from the policy. The court explained that the insured should not have to scour its hundred page policy to ascertain what coverage was being canceled. Thus, the court held that Brandon was entitled to coverage for the Dodge pickup under the Lessor Endorsement because cancellation of the Lessor Endorsement was not properly communicated by the insurer.<sup>102</sup>

*F. Town’s Decision to Delay Public Works Projects  
Not Covered by Errors and Omissions Policy*

In *Town of Orland v. National Fire & Casualty Co.*,<sup>103</sup> the town of Orland decided to delay water and sewer projects because of citizen opposition. When the town delayed the projects, an engineering contractor hired for the project was notified to stop working. The engineering contractor sued Orland in federal court asking for amounts owed for the services provided and seeking a declaratory judgement for its further obligations owed under the contract with Orland. In response to the engineers’ complaint, Orland filed a counterclaim to which the engineers asserted an abuse of process claim. Ultimately, the engineers and the town of Orland entered into a settlement agreement in the amount of \$356,460.<sup>104</sup>

Orland timely notified its insurer of the lawsuit, but the insurer refused to defend or indemnify. In turn, Orland filed a complaint in state court against its insurer seeking coverage under the policy’s errors and omissions provisions. The errors and omissions provisions provided coverage to Orland for “any claim for

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96. See *id.* at 858.

97. See *id.*

98. *Id.*

99. *Id.*

100. *Id.* at 859.

101. *Id.*

102. See *id.*

103. 726 N.E.2d 364 (Ind. Ct. App. 2000).

104. See *id.* at 366-68.



breach of duty made against the *insured* by reason of any negligent act, error or omission, including misfeasance, malfeasance and nonfeasance.”<sup>105</sup> The policy specifically excluded coverage for “any loss caused intentionally by or at the direction of the insured.”<sup>106</sup>

Orland argued that coverage extended to breaches of duty arising from contractual relations and that such coverage extends past mere negligence. In urging this result, Orland argued that because the policy included the term “malfeasance” in defining errors or omission, coverage must encompass more than mere negligence to include contractual breaches. Further, Orland argued that the engineers’ complaint could be read as seeking relief for its perceived mismanagement of the sewer and water projects, thereby bringing Orland’s conduct within the definition of negligence.<sup>107</sup>

However, the court did not agree with Orland’s reading of the insurance contract. The court found that malfeasance, along with misfeasance and nonfeasance, are commonly referred to as examples of negligence.<sup>108</sup> Indeed, the court stated that “a reasonable person could not conclude that the term [malfeasance] encompassed more than negligence.”<sup>109</sup>

Because the court found the delay to be the result of an intentional business decision made by Orland, it was not negligence as covered by the errors and omissions policy: “Orland, whether in good faith or not, deliberately made business decisions which caused [the engineers] to question Orland’s commitment to the contract and, thus, bring the federal lawsuit.”<sup>110</sup> Further, the court found that the insurer had no duty to defend Orland against the engineers’ abuse of process claims because these claims were also as a result of the town’s intentional acts.<sup>111</sup>

The court’s analysis discussed the purpose and intent behind a liability insurance policy. The policy is not intended as a bond to satisfy an insured’s business decisions. Instead, the policy is designed to cover accidental conduct by the insured that may produce personal injury or property damage.

#### *G. Insurer’s Duty to Defend and Waiver Of Defenses*

At first glance, the case of *State Farm Fire & Casualty Co. v. Bruce*<sup>112</sup> appears to be a case interpreting the child care services and sexual molestation exclusions in a homeowners’ policy. However, this case essentially reiterates the long-standing rule in Indiana that an insurer who refuses to defend an insured under a reservation of rights or who seeks declaratory judgment as to coverage

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105. *Id.* at 369 (emphasis in original).

106. *Id.*

107. *See id.* at 370.

108. *See id.*

109. *Id.*

110. *Id.* at 371.

111. *See id.* at 371-72.

112. 728 N.E.2d 919 (Ind. Ct. App. 2000).



does so at its own peril.<sup>113</sup>

In *Bruce*, the parents of a child brought suit against a babysitter after the child was molested by the babysitter's husband. The babysitter sought coverage under her homeowners' insurance policy. The homeowners' policy excluded coverage for claims arising from childcare services as well as claims for sexual molestation.<sup>114</sup>

The babysitter timely notified the insurer of the child's claim, but the insurer opted not to defend the insured relying on the childcare services and sexual molestation exclusions. The babysitter and the child entered into an Agreed Judgment, which the trial court accepted. The judgment concluded that the child was a guest in the babysitter's home, that the molestation had no correlation with the childcare services that were being rendered, and that a monetary judgment in favor of the child be entered in the amount of \$375,000. The babysitter assigned all of her rights against her insurer to the child, who filed a petition for proceedings supplemental against the insurer to collect the judgment.<sup>115</sup>

The court found that the insurer had full knowledge of the lawsuit and opted not to participate in the underlying litigation. Consequently, because the underlying judgment decided factual matters relating to coverage defenses that the insurance company wished to pursue, the insurer was collaterally estopped from re-litigating those issues.<sup>116</sup>

The insurer argued that it should be able to assert the childcare services and sexual molestation exclusions contained in the policy, but the court rejected this argument finding that the application of those defenses was already decided in the underlying case. The insurer next claimed that the judgment was entered as a result of fraud and collusion amongst the child and the babysitter. The court recognized that the insurer could present these defenses at the proceedings supplemental stage of the litigation, however, the insurer failed to provide any evidence of fraud or collusion.<sup>117</sup> Therefore, the court of appeals upheld the trial court's entry of summary judgment finding the insurer responsible for the agreed judgment.<sup>118</sup>

Insurers must be mindful of the harsh outcome that may occur if they refuse either to provide a defense to an insured or to file a declaratory judgment. If the insurer does not act to preserve its right to assert the coverage defense, it may be collaterally estopped even if the insured and plaintiff collude to form an underlying judgment on liability.

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113. See, e.g., *Liberty Mut. Ins. Co. v. Metzler*, 586 N.E.2d 897, 902 (Ind. Ct. App. 1992).

114. See *Bruce*, 728 N.E.2d at 920-21.

115. See *id.* at 921-22.

116. See *id.* at 923-24.

117. See *id.*

118. See *id.* at 926.



*H. When Does a Builder's Risk Policy Become Effective?*

In *Bosecker v. Westfield Insurance Co.*,<sup>119</sup> the Indiana Supreme Court reversed the trial court and the Indiana Court of Appeals when it found that a builder's risk insurance policy, acquired for the specific purpose of repair and renovation of an existing building, became effective when the policy was purchased and not when the owner began repair work. In *Bosecker*, the property owners contacted their insurance agent and described the building they wanted to insure. They told her it was a vacant apartment building on which they were undertaking numerous repairs and renovations. The agent sold the Boseckers a builder's risk policy which provided coverage for the existing buildings while repair and renovation work was being performed. The Boseckers purchased the policy on February 23, 1996. Ten hours after the property was added to the policy, the building was destroyed by fire. The insurer denied coverage on the basis that no repair work had been started on the building, such that the "builder's risk" policy was not activated. The trial court granted summary judgment in favor of the insurer, and the court of appeals affirmed.<sup>120</sup>

However, the supreme court reversed the lower courts, finding that the policy language was ambiguous.<sup>121</sup> Specifically, the supreme court focused on two contradictory provisions in the policy defining "Covered Property" and "Property Not Covered." "Covered Property" was defined as "[b]uildings or structures including foundations while in the course of construction, installation, reconstruction, or repair."<sup>122</sup> "Property Not Covered" was defined as "[e]xisting buildings or structures to which improvements, alterations, repairs, or additions are being made."<sup>123</sup>

The court was faced with the issue of whether the repair and renovation work had to be ongoing before coverage attached. It reasoned that to require the work to be ongoing before coverage attached was not practical.<sup>124</sup> The court noted that to hold otherwise would require an insured to "obtain two separate insurance policies, one to cover the two days before the repairs started, and one to cover the property while it was being repaired."<sup>125</sup> The court recognized that vacant buildings being held for a long period prior to commencing repair may present another coverage issue, but it is up to the insurer to differentiate between these circumstances in its policy.<sup>126</sup> This case is another example of the courts construing ambiguous policy language in favor of the insured to extend coverage and to encourage insurers to write clear policies.

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119. 724 N.E.2d 241 (Ind. 2000).

120. *See id.* at 242-43.

121. *See id.* at 243-45.

122. *Id.* at 243.

123. *Id.*

124. *See id.* at 245.

125. *Id.*

126. *See id.*



### *I. Liability for Failing to Purchase Coverage for Additional Insured*

Two cases, dealing with similar facts, found that when a party to a contract fails to purchase additional insurance as called for in the contract, that party is liable for the amount of coverage the insurance would have provided. In *Exide Corp. v. Millwright Riggers, Inc.*<sup>127</sup> and *Doherty v. Davy Songer, Inc.*,<sup>128</sup> the courts were faced with construction contracts that required contractors or subcontractors to purchase additional insurance coverage for the owner of the premises or the general contractor.

In both cases, the contractors charged with the obligation to purchase additional insurance, failed to do so.<sup>129</sup> When the contractors' employees were injured on the premises, they named the premises owners and the general contractor as defendants in their lawsuits. In both cases, the insurers denied coverage to the premises owner (*Exide*) and the general contractor (*Davy Songer*) despite the contractual obligation to do so. Both *Exide* and *Davy Songer* sued for breach of contract for failure to obtain additional insurance as called for in the contract.

The courts in both *Exide* and *Doherty* held the contractual provision requiring the purchase of additional insurance to be valid.<sup>130</sup> Both courts adhered to "the principle that parties may shift, by contract, their burdens of risk, and therefore affect the obligations of their insurers."<sup>131</sup> Further, the court in *Doherty* held that the measure of damages for the party who breached the contract is "the amount that would have been due under the policy [it] should have obtained."<sup>132</sup>

### *J. Coverage for Advertising Injury*

In *Heritage Mutual Insurance Co. v. Advanced Polymer Technology, Inc.*,<sup>133</sup> the court added "another installment in the ongoing debate about the meaning of 'advertising injury.'"<sup>134</sup> In this case, Advanced Polymer Technology (APT) was being sued for patent infringement by Environ Products, Inc. in a separate action. Environ's lengthy seven count complaint essentially alleged that APT unfairly competed with it by stealing its product and claiming it as its own. The product in question was an underground piping product used in the petroleum industry to transport fuel from storage tanks to fuel dispensers.<sup>135</sup>

APT sought coverage for Environ's lawsuit under the advertising injury

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127. 727 N.E.2d 473 (Ind. Ct. App. 2000).

128. 195 F.3d 919 (7<sup>th</sup> Cir. 1999).

129. See *Doherty*, 195 F.3d at 921.; *Exide*, 727 N.E.2d at 478.

130. See *Doherty*, 195 F.3d at 925-26; *Exide*, 727 N.E.2d at 482.

131. *Doherty*, 195 F.3d at 926 (citing *Am. Underwriters, Inc. v. Auto-Owners Mut. Ins. Co.*, 454 N.E.2d 876, 877 (Ind. Ct. App. 1983)). See also *Exide*, 727 N.E.2d at 482.

132. *Doherty*, 195 F.3d at 927.

133. 97 F. Supp. 2d 913 (S.D. Ind. 2000).

134. *Id.* at 915.

135. See *id.* at 916-17.



provisions of its policy purchased from Heritage.<sup>136</sup> The policy provided coverage for four specific types of advertising injury: (1) publication of material that slanders or libels or disparages another's "goods, products or services;" (2) "publication of material that violates a person's right of privacy;" (3) "misappropriation of advertising ideas or style of doing business;" or (4) "infringement of copyright, title or slogan."<sup>137</sup>

To determine whether Environ's lawsuit alleged any of these harms, the court closely examined Environ's complaint. Overall, the court found that Environ's cause of action was not based on wrongs it claimed to have suffered as a result of APT's improper advertising.<sup>138</sup> Rather, the court found that Environ's suit was a patent infringement action, not an action claiming that APT's advertising efforts harmed it.<sup>139</sup> Consequently, the court distinguished the advertising injury provisions of the policy accordingly. For example, the court found Environ's complaint did not allege infringement of copyright, title, or slogan. In so finding, the court determined that the term "title" did not mean ownership as it applied to a patent, but rather the term was more akin to the concept of naming, such as the name of a product or a means of describing a process. The court concluded that Environ did not allege that APT infringed upon the name of its piping product. Therefore, there was no coverage for advertising injury under this portion of the policy.<sup>140</sup>

Similarly, the court found that Environ's complaint did not allege that APT misappropriated Environ's advertising ideas or its style of doing business.<sup>141</sup> Further, the court concluded that Environ was not claiming that APT's advertising efforts disparaged it or invaded its right to privacy.<sup>142</sup> Ultimately, the court determined that none of Environ's allegations fell within the defined instances of advertising injury articulated in the policy.<sup>143</sup> Thus, the court found that Heritage did not owe APT a duty to defend or indemnify it in Environ's patent infringement lawsuit.<sup>144</sup>

"Advertising injury" coverage requires a fact sensitive analysis of the alleged wrong, and whether it involved an "advertising activity" to find such coverage, courts consistently require that the wrong occur during an advertising activity, and will look closely at what involves an "advertising activity."

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136. *See id.*

137. *Id.* at 917.

138. *See id.* at 924.

139. *See id.*

140. *See id.* at 923-25.

141. *See id.* at 927-28.

142. *See id.* at 932-35.

143. *See id.* at 934.

144. *See id.*



## II. AUTOMOBILE INSURANCE CASES

### A. Who Is an Insured?

The question of an alleged insured's residency has been the focus of a number of cases over the years.<sup>145</sup> In *Indiana Farmers Mutual Insurance Group v. Blaskie*,<sup>146</sup> the court was faced with the issue of whether an adult son of an insured, home on military leave, was a "resident" of the insureds' household and covered by the full policy limits of the insured's policy. Lynn Miller was involved in an accident while driving his parents' car which was covered by their automobile liability insurance policy. While Lynn was not a named insured, the policy covered a "family member" that is "related to you by blood, marriage or adoption [and] who is a resident of your household."<sup>147</sup> The residency issue was important because it determined the policy limits available. The policy provided coverage of \$100,000/\$300,000 for "family members" and \$25,000 for a non-family member permissive user.<sup>148</sup>

After the lawsuit was filed against Lynn, the evidence was closely scrutinized to determine his residence. He was thirty-seven years old at the time of the accident. Since graduating from high school, he had married and divorced his wife. He had a child by his former wife as well. When the accident happened, he was on leave from the U.S. Navy, which occurred every sixteen months. While on leave, he would stay with his parents or relatives for approximately ten days to a month. He kept his clothing in a duffle bag and slept on his parents' couch. He did not own a key to his parents' home, nor did he receive his mail at their house.<sup>149</sup>

In determining whether Lynn was a "resident" of his parents' home, and entitled to the full policy limits of coverage, the court focused upon general rules of policy construction; when reviewing an "extension" case, (i.e., cases that involve the issue of whether insurance coverage should be extended beyond the named insured), the court construes the contract terms broadly.<sup>150</sup> In interpreting the term "resident," the court considered the following factors: (1) whether Lynn maintained a physical presence in his parents' home; (2) whether Lynn had the subjective intent to reside there; and (3) the nature of Lynn's access to his parents' home and its contents.<sup>151</sup>

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145. See, e.g., *Jones v. W. Reserve Group*, 699 N.E.2d 711 (Ind. Ct. App. 1998); *Chance v. State Auto Ins. Cos.*, 684 N.E.2d 569 (Ind. Ct. App. 1997); *Erie Ins. Exch. v. Stephenson*, 674 N.E.2d 607 (Ind. Ct. App. 1996).

146. 727 N.E.2d 13 (Ind. Ct. App. 2000).

147. *Id.* at 14.

148. See *id.*

149. See *id.* at 14-15.

150. See *id.* at 15 (citing *Aetna Cas. & Sur. Co. v. Crafton*, 551 N.E.2d 893, 895 (Ind. Ct. App. 1990)). The Court also noted that when construing "exclusion" cases, it construes the term "resident" narrowly. See *id.*

151. See *id.* at 16-18.



In addressing each of the factors, the court concluded that Lynn was not a "resident", and was not entitled to full policy limit coverage. Lynn maintained a minimal presence at his parents' home such that he was a temporary visitor rather than a resident.<sup>152</sup>

### *B. Non-Cooperation Clause*

In *Gallant Insurance Co. v. Wilkerson*,<sup>153</sup> the Indiana Court of Appeals analyzed an insurer's conduct to determine whether it waived the policy defense of non-cooperation by the insured or was estopped from asserting it to avoid coverage. In *Wilkerson*, the insured was involved in an automobile accident with another driver who filed a lawsuit against the insured. The insurer provided the insured an attorney to defend the lawsuit, but little communication occurred between the insurance company and the insured. Settlement negotiations were unsuccessful and a trial was necessary.<sup>154</sup>

At the time of trial, the insured was in prison. However, the insurer did not seek the court's assistance to secure the insured's attendance at trial, and proceeded with his defense in his absence. After the injured driver recovered a judgment against the insured, she entered into an agreement with the insured for the assignment of all of the insured's rights and claims against the insurer.<sup>155</sup>

The injured driver filed a motion to enforce the judgment by proceedings supplemental against the insurer to recover the insured's policy limits in satisfaction of the judgment. In response, the insurer filed an answer alleging the insured had breached his policy's cooperation clause by failing to appear at trial. The trial court held that the insurer waived the defense of non-cooperation and was estopped from asserting it. The court entered a garnishment order for the maximum policy amount, plus costs and interest.<sup>156</sup>

On appeal, the Indiana Court of Appeals began its analysis by determining that a cooperation clause "applies to the conduct of the insured in proceedings subsequent to the notice of loss, claim, or suit, but prior to a determination of an insurer's liability."<sup>157</sup> The court further determined that the purpose of a cooperation clause is to "protect insurers by preventing collusion between the insureds and the injured parties."<sup>158</sup> However, before an insurer can take advantage of the non-cooperation defense, "the insurer must demonstrate that it exercised good faith and diligence in securing the cooperation of its insured before asserting the defense of non-cooperation."<sup>159</sup>

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152. See *id.* at 18.

153. 720 N.E.2d 1223 (Ind. Ct. App. 1999).

154. See *id.* at 1225.

155. See *id.* at 1225-26.

156. See *id.* at 1227-30.

157. See *id.* at 1226.

158. *Id.*

159. *Id.* This case may suggest a relaxation of the almost impossible element of an intentional or willful breach of the cooperation clause by an insured. In *Smithers v. Mettert*, 513 N.E.2d 660,



In analyzing whether the cooperation clause defense was waived, the court looked to the insurer's conduct and whether it had knowledge of the non-cooperation when it continued to act on behalf of the insured. The court found that the insurer had "notice of and the opportunity to control" the proceedings in the underlying tort action."<sup>160</sup> Specifically, the court found that the insurer had full knowledge that the insured was incarcerated at the time of trial. Indeed, the court found that under these unique circumstances, it was impossible for the insured not to violate the cooperation clause, because "it was both physically and legally impossible" for him to appear in court without the insurer intervening on his behalf.<sup>161</sup> The court found that the insurer had the opportunity to secure the insured's presence at trial, but failed to do so. Without any evidence in the record to support an inference that the insurer took affirmative steps necessary to procure the insured's attendance, the court of appeals affirmed the trial court's garnishment order, and the insurer was forced to pay its policy limits and costs.<sup>162</sup>

It is a difficult burden for an insurer to successfully establish that an insured failed to cooperate in the defense of a lawsuit. Indeed, the insurer is forced to make every effort to obtain the insured's cooperation. Failure to do so will prevent the insurer from obtaining a judicial declaration that the clause has been violated by the insured.

### C. *Excess Carrier's Duty to Defend*

The case of *PHICO Insurance Co. v. Aetna Casualty & Surety Co.*<sup>163</sup> is another example of a case in which the courts show little tolerance for insurance companies who do not actively defend their insureds. In *PHICO*, an excess insurer brought suit against the primary insurer claiming that the primary insurer breached a duty to the excess carrier to properly defend an underlying action in which it did not participate. In the underlying tort action brought against its insureds, the plaintiff sustained serious injuries. The primary insurer sent numerous notices to the excess insurer seeking advice in the defense strategy and indicating that the excess policy may be required to provide coverage in that case.<sup>164</sup>

Despite these notices from the primary insurer, the excess insurer failed to actively participate in the defense of the underlying tort action. Eventually, the primary insurer tendered its limits, prompting the excess insurer to settle the underlying case close to the scheduled trial date. The excess insurer filed an

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662-63 (Ind. Ct. App. 1987), the court indicated that an insurer must show that 1) the insurer used good faith and diligence to obtain the insured's cooperation; 2) the insured intentionally or willfully breached the cooperation clause; and 3) the insured's breach of the cooperation clause prejudiced the insurer.

160. 720 N.E.2d at 1228.

161. *Id.*

162. *See id.*

163. 93 F. Supp. 2d 982 (S.D. Ind. 2000).

164. *See id.* at 985-86.



equitable subrogation lawsuit against the primary insurer alleging that because of the primary insurer's unreadiness for trial, the excess insurer was hampered in its settlement negotiations, and was thus forced to pay more in settlement.<sup>165</sup>

The primary insurer sought summary judgment on the excess insurer's claim. Initially, Judge Tinder, from the Southern District of Indiana, determined that the Indiana Supreme Court would recognize a cause of action by an excess carrier against a primary carrier for negligent handling of the underlying claim. Nevertheless, Judge Tinder ruled as a matter of law, that the primary insurer did not breach a duty to the excess carrier. The court reasoned that with all of the notices the excess insurer received in this case, it was well aware that it should have become actively involved in the defense of the underlying action. Further, because the excess insurer refused to act, it could not now come into court and complain. Accordingly, the court found that the doctrines of waiver, estoppel and laches applied to bar the excess insurer's claims against the primary insurer.<sup>166</sup>

#### *D. Reliance on Statements by Insurance Adjuster*

In *Darst v. Illinois Farmers Insurance Co.*,<sup>167</sup> the court of appeals was faced with the question of whether statements made by an insurance adjuster about the value of the insured's case could be relied upon by the insured or whether the statements were merely opinions. In April 1996, Sloan was in an automobile accident with Weger. After the accident, a representative from Weger's insurer contacted Sloan and offered him \$4,000 to settle his property damage and bodily injury claims. Not knowing whether to accept the offer, Mr. Sloan called his claims representative, Gaumer. Sloan claims that Gaumer told him that the \$4,000 offer was a fair settlement, and that he should accept it rather than retaining an attorney. Sloan accepted the \$4,000 and released Weger from further liability on the claim.<sup>168</sup>

Sloan eventually filed for bankruptcy. The bankruptcy trustee sued Sloan's insurer, claiming that Gaumer's statements to Sloan constituted actual and constructive fraud, negligent misrepresentations, and breached an assumed duty to provide accurate information. The trial court awarded summary judgment in favor of the insurer, and the bankruptcy trustee appealed.<sup>169</sup>

The court of appeals examined the elements of both the actual and constructive fraud claims brought by the trustee and determined that each tort required a misrepresentation of fact to be actionable.<sup>170</sup> Further, in order to

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165. See *id.* at 988.

166. See *id.* at 995.

167. 716 N.E.2d 579 (Ind. Ct. App. 1999), *trans. denied* 735 N.E.2d 228 (Ind. 2000).

168. See *id.* at 580-81.

169. See *id.* at 581.

170. See *id.* See also *Spolnik v. Guardian Life Ins. Co. of Am.*, 94 F. Supp. 2d 998 (S.D. Ind. 2000) (noting misrepresentations of law (not fact), made by insurer's agent, absent a showing of a significant relationship, are not actionable fraud). But see *Am. Family Mut. Ins. Co. v. Jeffrey*,



maintain the fraud actions, Sloan must have had a reasonable right to rely on Gaumer's statements.<sup>171</sup> The court found that, as a matter of law, expressions of opinion cannot be considered factual representations.<sup>172</sup> Also, the court explained that an insured may reasonably expect his insurance agent to be knowledgeable about what is covered under the policy or details about the policy itself. But, it is not reasonable to expect that an insurance agent will be aware of the merits of a claim and the value of an insured's case. Based on the evidence in the record, the court found that Gaumer's statements to Sloan were expressions of opinion rather than fact, and Sloan had no reasonable right to rely on them.<sup>173</sup>

With respect to the negligent misrepresentation and breach of duty claims, the court found that, with the limited exception of employment cases, Indiana does not recognize the tort of negligent misrepresentation.<sup>174</sup> The court also found that the cause of action for breach of assumed duty to provide accurate information was essentially a negligent misrepresentation claim disguised under a different name.<sup>175</sup> Thus, the court also found the breach of duty claim was not viable.<sup>176</sup>

As such, the court of appeals affirmed the trial court's grant of summary judgment in favor of the insurer. However, in the dissenting opinion, it was suggested that a genuine issue of material fact existed to preclude summary judgment because Gaumer may have had a duty not to misrepresent the information he provided to Sloan.<sup>177</sup> The dissent analyzed whether this case may fit into a limited exception for a viable negligent misrepresentation claim. As was noted in *Eby*, the court of appeals recognized a negligent misrepresentation claim when "[o]ne who, *in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest*, supplies false information for the guidance of others in their business transactions."<sup>178</sup> The dissent did not agree with the majority that the application of negligent misrepresentation as a cause of action was so limited.<sup>179</sup>

While existing law demonstrates that an insurer and insured have a special relationship, the adjuster had no interest or duty related to the insured's claim against another, such that the information was merely an opinion, not a fact.<sup>180</sup> Thus, the majority properly concluded that no actionable claim existed.

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No. 98-1085, 2000 WL 1206623, \*7 (S.D. Ind. Aug. 11, 2000) (citing *Lawyers Title Ins. Corp. v. Pokraka*, 595 N.E.2d 244, 249 (Ind. 1992) (criticizing the distinction under Indiana law between misrepresentation of law and fact)).

171. 716 N.E.2d at 582.

172. *See id.* at 581-82.

173. *See id.*

174. *Id.* at 584.

175. *See* 716 N.E.2d at 584-85.

176. *See id.*

177. *See id.* at 585 (Mattingly, J., dissenting).

178. *Id.* at 586 (citing RESTATEMENT (SECOND) OF TORTS § 552) (emphasis in original).

179. *See id.*

180. *See Erie Ins. Co. v. Hickman*, 622 N.E.2d at 515, 518 (Ind. 1993).



*E. Agent's Statements Can Bind Insurer to Coverage*

In *Gallant Insurance Co. v. Isaac*,<sup>181</sup> the court was faced with the issue of whether an agent's statements to an insured could bind insurance coverage even though the agent's actions were not sanctioned or approved by the insurer. In *Isaac*, Ms. Isaac obtained automobile insurance coverage for her 1986 Fiero through her insurer by purchasing from one of its agents, Thompson-Harris. On the last day of her existing insurance period, Ms. Isaac purchased a 1988 Grand Prix, and needed to be fully insured.<sup>182</sup>

She called Thompson-Harris and explained her need to cancel the coverage on the Fiero and obtain coverage for the Grand Prix. The agent orally indicated that because the office was about to close for the weekend, it would immediately bind coverage on the Grand Prix, and Ms. Isaac could come in on Monday to complete the paperwork and pay the premium.<sup>183</sup> This practice was against the guidelines of the insurer.<sup>184</sup>

On Sunday, Ms. Isaac was in an accident resulting in damage to her new Grand Prix. The next day, as planned, Ms. Isaac went to the agency, completed the paperwork, paid her premium and reported the loss. The agency sent all of the paperwork about the new coverage and accident to the insurer.<sup>185</sup> Later that month, the insurer renewed Ms. Isaac's policy, with an effective date beginning after the accident.

Predictably, the insurer denied coverage for the accident, and sought a declaratory judgment that no coverage existed on the basis that the accident occurred before the policy became effective.<sup>186</sup> Ms. Isaac responded by filing a motion for summary judgment seeking coverage based on the principles of agency law recently articulated by the Indiana Supreme Court in *Menard, Inc. v. Dage-MTI, Inc.*<sup>187</sup> Basically, Ms. Isaac argued that the Thompson-Harris agency had the inherent authority to bind the insurer to coverage when the agent told Ms. Isaac over the telephone, that she was covered.

The court found that *Menard's* three-part agency test was satisfied when Ms. Isaac demonstrated that (1) the agent's conduct was within the usual and ordinary scope of its agency; (2) she was reasonable in her belief that the agent could bind coverage over the phone without payment; and (3) she was not on notice that the agent could not bind coverage on behalf of the insurer.<sup>188</sup> The court found that Thompson-Harris may have violated its insurer's policy not to bind coverage without receiving a premium payment. However, the court intimated that the

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181. 732 N.E.2d 1262 (Ind. Ct. App. 2000).

182. See *id.* at 1265.

183. See *id.*

184. See *id.* at 1269-70.

185. See *id.* at 1265-66.

186. See *id.* at 1266.

187. 726 N.E.2d 1206, 1211 (Ind. 2000).

188. See *Isaac*, 732 N.E.2d at 1267.



agent may have followed an accepted practice of the insurer to accept orders from the agents by telephone and facsimile. Further, the court reasoned that of the two innocent parties who suffered from the agent's wrongdoing, the court preferred that the insurer bear the loss because it is in a better position to address the problem in the future.<sup>189</sup>

While the outcome of this case appears appropriate from the recited facts, this precedent could lead to expanded insurance coverage from agent's actions in future cases. Using this case, insureds can argue that an agent's representatives, even if without the insurer's permission or knowledge, may lead one to reasonably believe that coverage exists, such that the insurer must be bound. Insurance companies must closely watch the practices of insurance agents and demonstrate a clear showing that certain conduct violates the company's policies to avoid being bound in the future.

#### *F. Underinsured Motorist Coverage for Passenger of Motorcycle*

The court in *Veness v. Midland Risk Insurance Co.*<sup>190</sup> was asked to decide whether uninsured/underinsured motorist insurers are required to provide coverage for insureds injured when riding a motorcycle. The insured was thrown from a motorcycle on which she was a passenger and sustained bodily injury. On the date of the accident, the insured had coverage for underinsured motorist liability, but the policy specifically excluded coverage to the insured injured while occupying a motorcycle.<sup>191</sup>

The insured collected the liability policy limits from the motorcycle driver's insurer, and submitted a claim to her insurer for underinsured motorist benefits. Her insurer denied the claim by relying upon the motorcycle exclusion in the policy. After the insured filed suit, the trial court granted summary judgment in favor of the insurer based on the exclusion.<sup>192</sup> The insured appealed arguing that the motorcycle exclusion violated Indiana's Uninsured/Underinsured Motorist Coverage Statute ("UM/UIM").<sup>193</sup>

Upon review, the court focused extensively upon the purpose and intent of the UM/UIM Statute. The coverage is designed to protect innocent victims of accidents with the uninsured or underinsured motorist. As the Indiana Supreme Court observed, the UM/UIM Statute requires insureds be able to obtain full recovery from an inadequately insured motorist. While insurers can freely include language to limit or exclude coverage, those restrictions must still comply with the spirit and the letter of the UM/UIM statute.<sup>194</sup>

The court narrowed the issue to whether a motorcycle fit the definition of

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189. See *id.* at 1269-70.

190. 732 N.E.2d 209 (Ind. Ct. App. 2000).

191. See *id.* at 210-11.

192. See *id.* at 211.

193. IND. CODE § 27-7-5-2 (2000).

194. See *id.* at 212-13.



"motor vehicle" under the UM/UIM statute.<sup>195</sup> The court concluded that it met the definition, and that uninsured/underinsured motorist carriers were required to offer the coverage to occupiers of motorcycles.<sup>196</sup>

The conclusion in *Veness* follows the intent and purpose of the UM/UIM Statute. As long as operators of motorcycles are permitted upon the roadways, they should be afforded protection from inadequately insured motorists, just as any other motorist would expect.

### G. Set-Off in Underinsured Motorist Claim

In *Grain Dealers Mutual Insurance Co. v. Wuethrich*, the Indiana Court of Appeals analyzed the issue of set-off in the context of an underinsured motorist claim.<sup>197</sup> Specifically, the question was whether sums paid by a non-motorist tortfeasor in settlement of the insured's claim should be applied to reduce the amount available under the uninsured motorist coverage.<sup>198</sup> The court held that all sums paid, either by motorist or non-motorist tortfeasors, should be included in the set-off.<sup>199</sup>

The facts were not complicated. Wuethrich's vehicle was struck by Bartelmann's vehicle, while she was waiting in a line of construction traffic near a road construction site. As a result of the accident, Wuethrich sustained serious injuries and incurred damages in excess of Bartelmann's policy limits. Wuethrich sued Bartelmann, Bucko Construction Company, the State of Indiana, and her underinsured motorist carrier, Grain Dealers.<sup>200</sup>

Wuethrich settled for Bartelmann's policy limits of \$25,000. She also settled with Bucko and the State for a combined \$150,001. Her carrier advanced \$25,000 to Wuethrich in order to retain a right of subrogation against Bartelmann, but later waived that right. In all, Wuethrich received a total of \$50,000 from Bartelmann and Grain Dealers. Adding the amounts she received from Bucko, the State, Bartelmann and Grain Dealers, Wuethrich recovered a total of \$200,001.<sup>201</sup>

Ms. Wuethrich's policy with Grain Dealers allowed for underinsured motorist benefits of \$100,000 per person, per incident. All parties agreed that Ms. Wuethrich's damages exceeded her underinsured motorist policy limits. Ms. Wuethrich argued that Grain Dealers owed the remaining \$50,000 of underinsured motorist limits without a set-off for the amounts paid by Bucko and the State because they were non-motorist tortfeasors. She asserted that Grain Dealers was only entitled to set-off amounts paid by motorist tortfeasors. Grain

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195. See *id.* at 213.

196. See *id.* at 215.

197. 716 N.E.2d 596 (Ind. Ct. App. 1999), *trans. denied* 735 N.E.2d 222 (Ind. 2000).

198. See *id.* at 597.

199. See *id.* at 600.

200. See *id.* At 597. Ms. Wuethrich alleged that Bucko and the State were negligent in controlling the traffic flow and placement of signage at the construction site. See *id.*

201. See *id.* at 598.



Dealers argued that the policy language allowed for credit of all sums paid by persons found to be legally liable in settlement of the insured's claim. Further, Grain Dealers asserted that set-off should be allowed for all sums paid by tortfeasors, regardless of whether the tortfeasor was a motorist.<sup>202</sup>

The court, although never squarely faced with this question before, interpreted the policy to permit setoff of payments made by "any person or organization which may be legally liable" for Ms. Wuethrich's injuries.<sup>203</sup> Consequently, the sums paid by these non-motorist defendants were subject to a set-off under the policy. The court concluded that neither the policy, nor the underinsured motorist statute limited the setoff sought by Grain Dealers.<sup>204</sup>

#### *H. Insurer's Participation in Settlement Negotiations Does Not Waive Its Right to Notice of a Lawsuit*

An insurance company expects its insureds to provide timely notice of a lawsuit so that the insurer can take steps to perform an investigation and defend the insured. In *Gallant Insurance Co. v. Allstate Insurance Co.*, the court examined how much notice of a lawsuit an insurer may expect.<sup>205</sup>

An automobile accident occurred between Richey and Moore.<sup>206</sup> Richey filed a personal injury lawsuit against Moore, which was tendered to her insurer, Gallant. The personal injury claim was eventually settled. In the meantime, Allstate paid Richey for property damage from the accident, and filed a separate subrogation lawsuit against Moore. Moore never tendered the lawsuit to Gallant. Allstate also failed to forward a "courtesy copy" of the lawsuit to Gallant or its attorney.<sup>207</sup>

Allstate eventually obtained a default judgment against Moore, and instituted proceedings supplemental against Gallant to recover the property damage.<sup>208</sup> Gallant argued that it owed no coverage for Allstate's property damage lawsuit because it did not receive proper notice. The trial court found that Gallant had proper notice based on the negotiations in the other case, and Gallant appealed.<sup>209</sup>

In analyzing the insurance policy, the court of appeals observed that it specifically excluded coverage when Gallant did not receive actual notice of the lawsuit before entry of judgment. Gallant argued that it did not have actual notice of the lawsuit until after the default judgment had been entered. Allstate contended that Gallant's control of the defense and settlement of the personal injury claim should have led a reasonable insurance company to anticipate a

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202. See *id.* at 598-99.

203. *Id.* at 600.

204. See *id.*

205. 723 N.E.2d 452 (Ind. Ct. App. 2000).

206. See *id.* at 454.

207. See *id.*

208. See *id.*

209. See *id.* at 455.



subrogation claim to recover the property damage.<sup>210</sup>

The court concluded that “[k]nowledge of a pending claim or that a lawsuit might be filed is not equivalent to actual notice that a suit has been filed as required under the policy.”<sup>211</sup> Thus, the court upheld Gallant’s expectation of receiving “actual” notice of the lawsuit, rather than requiring it to guess or anticipate a lawsuit may be filed.

Allstate also argued that public policy favored compensation of “innocent victims,” and that the court should find that Gallant waived its right to notice.<sup>212</sup> However, the court observed that it “was hard pressed to attribute the term ‘innocent’ to Allstate, which knew of Gallant’s duty to defend Moore, yet failed to notify either Moore’s counsel or Gallant of the subrogation lawsuit until it sought a default judgment against Moore.”<sup>213</sup> The court cited a recent Supreme Court decision for the proposition that the “administration of justice requires that parties *and their known lawyers* be given notice prior to a lawsuit prior to seeking default judgment.”<sup>214</sup> Consequently, the court held that Gallant was not liable to indemnify Ms. Moore for Mr. Richey’s property damage.

### *I. Underinsured Motorist Coverage in Garage Liability Policy*

In *Myles v. General Agents Insurance Co. of America, Inc.*,<sup>215</sup> the Seventh Circuit decided whether underinsured motorist benefits were recoverable under a garage liability policy. When Vivian Myles’ automobile became inoperable, her brother, Richard Rench, the owner of a car dealership, loaned her a car until her car was repaired. Ms. Myles used the car solely for transportation to and from work. The loaner car was insured under a garage liability policy issued to her brother’s dealership.<sup>216</sup>

After driving the car for a few days, Ms. Myles sustained serious injuries in an automobile accident with a driver who only had insurance coverage of only \$25,000. The other driver’s insurance company paid Ms. Myles its policy limits, but because of the cost Ms. Myles’ injuries surpassed \$25,000 and because her own personal automobile insurance coverage had lapsed, she sought underinsured motorist coverage from the car dealership’s policy.<sup>217</sup>

After the trial court granted summary judgment to the insurer finding that no underinsured motorist coverage was available, Ms. Myles appealed. The Seventh Circuit Court of Appeals observed that to be entitled to underinsured motorist

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210. *See id.*

211. *Id.* at 456.

212. *Id.*

213. *Id.*

214. *Id.* (quoting *Smith v. Johnston*, 711 N.E.2d 1259, 1264 (Ind. 1999) (emphasis in original)).

215. 197 F.3d 866 (7<sup>th</sup> Cir. 1999).

216. *See id.* at 867-68.

217. *See id.*



benefits, Ms. Myles must qualify as an "insured" under the dealership's policy.<sup>218</sup>

The policy defined "insured" as those driving "covered autos" with the policy owner's permission. Pursuant to the policy, the policy owner was required to designate "covered autos" by listing them on an addendum. Accordingly, the insured's premium payments varied with the number of designated insureds. The policy language stated that a "covered auto" does not include an auto furnished for the "regular use" of any person unless the driver of the auto is specifically listed in the policy.<sup>219</sup> Under the policy, coverage extended to the occasional use by a non-listed driver who had the insured's permission to drive the covered auto.<sup>220</sup>

Ms. Myles conceded that she was not listed as a driver of a covered auto in the policy. Nevertheless, she claimed she should be covered under various theories. First, she argued that the term "regular use" was ambiguous, and should be construed against the insurance company. Second, even if the term "regular use" were unambiguous, Ms. Myles contended that she was not a regular user of the vehicle. Finally, even if she were a regular user, Ms. Myles argued that she was also an occasional user for emergency purposes, which was expressly covered.<sup>221</sup>

The court reviewed the contract term "regular use" and found it to be unambiguous. Finding no ambiguity, the court applied the term "regular use" to the facts and determined that Ms. Myles used the loaner car to drive to and from work for a few days prior to the accident. The court ultimately found that Ms. Myles' use of the loaner car as transportation to and from work every day, was a "regular use" of the vehicle. The court stated that "transportation to and from work on a routine and recurring basis over the course of several days" was "within the scope of the regular use exclusion" of the policy.<sup>222</sup>

The court also rejected Ms. Myles argument that she was an occasional user for emergency purposes, based upon its prior conclusion that her use of the car was routine.<sup>223</sup> Thus, the court affirmed the trial court's grant of summary judgment in favor of the insurer.<sup>224</sup> The court recognized that an insurance company only provides coverage for certain defined risks in which a policy premium has been paid. Because the dealership selected a limited number of potentially covered operators of the vehicles, for which it received a lower premium, the court properly found that no coverage existed.

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218. *See id.*

219. *Id.* at 869.

220. *See id.* at 869-69.

221. *See id.* at 869.

222. *Id.* at 870.

223. *See id.*

224. *See id.*



*J. Insurer Breached Insurance Contract by Stopping Payment of Settlement Check*

In *Gallant Insurance Co. v. Amaizo Federal Credit Union*,<sup>225</sup> the court was asked to determine whether the insurer's attempt to stop payment of a settlement check constituted a breach of the insurance contract. The court ultimately held that a loss is "paid" by the insurer when the check is tendered for payment to the insured, not when the check is deposited in the insured's account.<sup>226</sup> Consequently, stopping payment of a settlement check after it was tendered was a breach of the insurance contract.<sup>227</sup>

In the case, the Credit Union was named as a loss payee in the policy for an automobile that was stolen in December of 1995 in Calumet City, Illinois. The insured immediately notified the Credit Union that the vehicle had been stolen. On February 26, 1996, the insurer prepared a check for the value of the car naming the Credit Union and the insured as loss payees. Two days later, the Calumet City Police Department notified the insured that his stolen vehicle had been recovered. On March 1, 1996, the insurer, unaware that the stolen vehicle was recovered, sent the check to the Credit Union, and requested that the Credit Union return the title to the vehicle. On March 7, 1996, the Credit Union forwarded the title to the stolen vehicle to the insurer. On March 8, the Credit Union endorsed the check and deposited it into its account. On March 11, the Credit Union's bank presented the check to the payor bank for payment. On March 14, the insurer learned that the stolen vehicle was recovered and repairable, and notified the Credit Union that it was going to stop payment on the check because of the vehicle's recovery.<sup>228</sup>

A few months later, the Credit Union filed a complaint against the insurer alleging that the insurer breached the insurance contract when it stopped payment of the check after the loss had been paid. The Credit Union also sought attorney fees because the insurer stopped payment of the check without valid legal cause. In a summary proceeding, the trial court found in favor of the Credit Union and awarded the Credit Union attorney's fees. The insurer appealed.<sup>229</sup>

In deciding whether the insurer wrongfully stopped payment of the check and breached the insurance contract, the court of appeals first determined whether the insurer "paid" the loss as defined by the insurance contract.<sup>230</sup> The loss provision in the insurance contract stated that the insurer "may pay for the loss in money; or may repair or replace the damaged or stolen property; or may, at any time before the loss is paid or the property is so replaced, at its expense return any stolen property to the named insured."<sup>231</sup> Consequently, the insurer could elect

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225. 726 N.E.2d 860 (Ind. Ct. App. 2000).

226. *See id.* at 866-67.

227. *See id.* at 867.

228. *See id.* at 863.

229. *See id.*

230. *See id.* at 865.

231. *Id.* at 864.



to repair the stolen vehicle, but only *before* it paid a claim for a loss of the stolen vehicle.

The court found that the term "paid," as it was contained in the policy, was ambiguous. As such, the term was strictly construed against the insurer as the drafter of the policy. The court looked to Indiana's version of Article 9 of Uniform Commercial Code (UCC)<sup>232</sup> and case law precedent<sup>233</sup> to derive the meaning of "paid." The Court found that the settlement check was considered "paid" when it was tendered to the Credit Union, not when it was debited to the Credit Union's account.<sup>234</sup>

Because the loss was considered paid when the insurer tendered the check, the court found that the insurer's stop payment was a breach of the insurance contract. Furthermore, under Ind. Code § 26-2-7-5-(3), the Credit Union was eligible for, and received, attorney's fee award as a result of the insurer stopping payment of the check without a valid legal cause.<sup>235</sup>

This ruling follows the intent of Indiana's UCC to establish consistency in transactions. To permit the insurer to unilaterally void the agreement with the Credit Union after issuance of a draft which was received and relied upon by the Credit Union would frustrate that policy.

### III. HEALTH, DISABILITY AND ERISA INSURANCE CASES

One case was decided during the survey period that was significant to disability insurance coverage. In *Stinnett v. Northwestern Mutual Life Insurance Co.*,<sup>236</sup> the court was faced with the issue of whether a provision in a disability insurance policy requiring the insured be under the continuing care of a licensed physician during the period of disability was enforceable. The court recognized the requirement that patients be under the care of a physician in disability policies is generally enforceable with limited exceptions. Yet, the insured argued that the continuing physical care requirement "should not be enforced when there is other evidence of an insured's disability."<sup>237</sup> The insured also argued that his depression, which was his claimed disability, was a contributing factor in him not seeking continuing treatment. The court ultimately rejected both arguments in following the general rule that absent evidence of futility or unavailability of continuing medical treatment, the care of a physician requirement in the disability policy was enforceable.<sup>238</sup>

Only one notable case was published during this survey period which interpreted the Employee Retirement Income Security Act of 1974 (ERISA). In

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232. IND. CODE § 26-1-2-511 (2000).

233. O'Donnell v. Am. Employers Ins. Co., 622 N.E.2d 570 (Ind. Ct. App. 1993).

234. See *Amaizo*, 726 N.E.2d at 866-67.

235. See *id.* at 867.

236. 101 F. Supp. 2d 720 (S.D. Ind. 2000).

237. *Id.* at 724.

238. See *id.* at 726.



*Midwest Security Life Insurance Co. v. Stroup*,<sup>239</sup> the Indiana Supreme Court held that causes of action for breach of contract and bad faith denial of insurance coverage are state law claims preempted by ERISA. The *Stroup* case clarifies Indiana law on the issue of whether breach of contract and bad faith claims were preempted.

However, prior to the publication of *Stroup*, the United States District Court for the Southern District of Indiana in *Reber v. Provident Life & Accident Insurance Co.*<sup>240</sup> also found that those state claims were preempted by ERISA. In so doing, the *Reber* court relied on cases that had previously announced that breach of contract and bad faith claims arising out of the processing of health insurance benefit claims under ERISA were preempted.<sup>241</sup>

#### IV. LIFE AND FUNERAL INSURANCE CASES

One case published during the survey period discussed Indiana's long standing rule that a beneficiary of a life insurance policy who intentionally causes the death of the insured is not entitled to recover benefits of the policy. In *Metropolitan Life Insurance v. Wattley*,<sup>242</sup> the court denied the insurer's motion for summary judgment on the basis that there was a question of fact as to the beneficiary's intent when she killed the insured. In *Wattley*, the beneficiary pled guilty to reckless homicide after fatally stabbing her husband.<sup>243</sup> "The requisite *mens rea* for reckless homicide is recklessness, not knowledge or intent."<sup>244</sup> Because the court had before it no evidentiary determination as to "precisely how Mr. Merchant was stabbed, and Ms. Wattley's state of mind at that moment," it could not hold as a matter of law that Ms. Wattley was not entitled to benefits.<sup>245</sup>

Another case dealing with funeral insurance was decided during the survey period. The case of *D.O. McComb & Sons, Inc. v. Feller Funeral Home, Inc.*<sup>246</sup> interpreted the Indiana statute governing transfers of funeral insurance policies. In *D.O. McComb*, the original seller of a funeral insurance policy was asked by the purchaser to transfer the policy to another funeral home.<sup>247</sup> The original seller transferred the policy, but sued the successor seller to recover the five

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239. 730 N.E.2d 163 (Ind. 2000).

240. 93 F. Supp. 2d 995 (S.D. Ind. 2000).

241. See *id.* at 1010 (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987) (stating that state law claims for breach of contract, and bad faith, and fraud in the processing of benefits are preempted by ERISA)). See also *Panaras v. Liquid Carbonic Indus. Corp.*, 74 F.3d 786 (7<sup>th</sup> Cir. 1996); *Tomczyk v. Blue Cross & Blue Shield United of Wis.*, 951 F.2d 771 (7<sup>th</sup> Cir. 1991).

242. 109 F. Supp. 2d 1017 (N.D. Ind. 2000).

243. See *id.* (citing *Brown v. State*, 659 N.E.2d 652, 656 (Ind. Ct. App. 1995)).

244. *Id.* at 1019.

245. *Id.*

246. 720 N.E.2d 454 (Ind. Ct. App. 1999).

247. See *id.* at 455.



percent transfer fee allowable by statute.<sup>248</sup> The court held that the original seller was not entitled to a five percent transfer fee because there was no property held in trust which the original seller was required to transfer. The court noted that the purpose of the transfer fee was to compensate for a party who has managed assets under the funeral planning agreement. Because there were no assets to maintain under the funeral planning agreement, the original seller was not entitled to compensation.<sup>249</sup>

#### CONCLUSION

In all, cases decided during this survey period did not drastically alter the landscape of insurance law. There were, however, isolated examples that have the potential to impact this area significantly. Notwithstanding the lack of quantity, the court in *Patel* may have significantly increased the potential exposure for insurance companies sued for bad faith by allowing recovery of emotional distress damages and attorney fees. The courts also made it easier for insureds to escape the intentional acts exclusion by suggesting that an "I did not mean to" defense may survive summary judgment.

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248. IND. CODE § 30-2-13-13 (2000).

249. 720 N.E.2d at 456.







# SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

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## INTRODUCTION

The last year of the Twentieth Century was an important one in the further development of Indiana product liability law.<sup>1</sup> During the 2000 survey period,<sup>2</sup> Indiana courts made some landmark pronouncements, answered some questions, and raised some new ones.

This Article does not attempt to provide a survey of all cases involving Indiana product liability law decided during the survey period. Rather, it addresses selected cases that are representative of the seminal product liability issues courts applying Indiana law have handled during the survey period.<sup>3</sup> The

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1. Although many commentators and courts use the term "products liability" when referring to actions alleging damages as a result of defective and/or unreasonably dangerous consumer products, the applicable Indiana statutes utilize the term "product liability" (no "s"). This Article follows the lead of the Indiana General Assembly and likewise employs the term "product liability."

2. The survey period for this Article is October 1, 1999 to September 30, 2000. Some cases on the periphery of those dates are included.

3. There are at least two cases worthy of special mention here that this Article does not address in detail. The first is *Guerrero v. Allison Engine Co.*, 725 N.E.2d 479 (Ind. Ct. App. 2000). Although *Guerrero* is a case involving an allegedly defective helicopter engine, the case focuses upon Indiana law as it relates to corporate successor liability. The plaintiffs were a passenger injured in helicopter accident and the administrator of the estate of another passenger killed in the accident. The plaintiffs sued the successor corporation that purchased all the assets of a division of the company that manufactured the engines. At issue was whether a corporation that purchases the assets of another assumes the debts and liabilities of the seller. *See id.* at 480-81. The court first recognized the general rule that the successor corporation does not assume such liability unless the predecessor corporation no longer exists and one of the following four conditions exist: (1) an express or implied agreement to assume liability; (2) fraud to escape liability; (3) a *de facto* consolidation; or (4) the buyer's continuation of the seller's business. *See id.* at 483. Because the predecessor still existed and because the successor did not manufacture the engine, there was no cause of action against the successor. *See id.* at 487.

The second case, *Bloemker v. Detroit Diesel Corp.*, 720 N.E.2d 753 (Ind. Ct. App. 1999), is worthy of mention but is not discussed in detail in this Article because it is based upon Indiana law before the 1995 Indiana Product Liability Act ("IPLA") amendments. In *Bloemker*, a pattern maker, injured while modifying a pattern, sued the pattern owner and the owner of the premises



Article also provides some background information and context where appropriate.

### I. STATUTE OF REPOSE

Indiana Code section 34-20-3-1(b) provides, in relevant part, that "a product liability action must be commenced: (1) within two (2) years after the cause of action accrues; or (2) within ten (10) years after the delivery of the product to the initial user or consumer."<sup>4</sup> Practitioners generally refer to the latter of those clauses as the product liability statute of repose.

In light of the Indiana Supreme Court's decisions in *Martin v. Richey*<sup>5</sup> and *Van Dusen v. Stotts*,<sup>6</sup> product liability practitioners in Indiana anxiously awaited word from the court about the fate of the product liability statute of repose.<sup>7</sup> On

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(foundry) where the pattern was being used for negligence. The trial court entered summary judgment for the defendant. *See id.* at 754-55. At issue on appeal was whether the pattern owner and foundry owed duties of reasonable care to the plaintiff in his capacity as a supplier of a chattel. *See* RESTATEMENT (SECOND) OF TORTS §§ 388, 392. Section 388 imposes a duty on a supplier who knows or has reason to know that chattel is or is likely to be dangerous, has no reason to think those using the chattel will realize it is dangerous and fails to inform them of the dangerous condition. *See Bloemker*, 720 N.E.2d at 757. Section 392 is similar and adds a requirement that the supplier exercise reasonable care to make the chattel safe for the use for which it is supplied. *See id.*

4. IND. CODE § 34-20-3-1 (2001). Indiana Code section 34-20-3-1(b) also provides that "if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues." *Id.* § 34-20-3-1(b). As the statute makes clear, a claimant must bring a product liability action in Indiana within two years after it accrues, but in any event, not longer than ten years after the product is first delivered to the initial user or consumer. Such is true unless the action accrues in the ninth or tenth year after delivery, in which case the full two-year period is preserved, commencing on the date of accrual. *See id.* Accordingly, the longest possible time period in which a claimant may have to file a product liability claim in Indiana is twelve years after delivery to the initial user or consumer, assuming accrual at some point in the twelve months immediately before the tenth anniversary of delivery.

5. 711 N.E.2d 1273 (Ind. 1999).

6. 712 N.E.2d 491 (Ind. 1999).

7. The *Martin* case involved an alleged claim of medical malpractice against a physician for failure to appropriately diagnose and treat her breast cancer. *See Martin*, 711 N.E.2d at 1276-77. *Martin* did not discover her condition until more than two years from the occurrence of the alleged malpractice and, therefore, beyond the act's two-year limitation period. *See id.* The *Martin* court determined under these facts that application of the two-year occurrence-based statute of limitations is unconstitutional under article I, section 23 of the Indiana Constitution because it is not "uniformly applicable" to all medical malpractice victims given that victims such as *Martin* are precluded from pursuing a claim in light of the prolonged period of time between the alleged act of malpractice and the discovery of their condition. *Id.* at 1279. According to the court, the statute of limitations, as applied to *Martin*, was also unconstitutional under article I, section 12 of the Indiana Constitution because it required her to file a claim before she was able to discover the



May 26, 2000, practitioners received their answer. In *McIntosh v. Melroe Co.*,<sup>8</sup> the Indiana Supreme Court, in a 3-2 decision, held that Indiana's ten-year product liability statute of repose does not violate either sections 12 or 23 of article I of the Indiana Constitution. The decision affirmed earlier decisions of both the court of appeals<sup>9</sup> and the trial court. Justice Boehm wrote the majority opinion, which Chief Justice Shepard joined. Justice Sullivan's concurring opinion provided the three vote majority.<sup>10</sup>

James McIntosh was injured in a 1993 accident involving a Clark Bobcat skid steer loader Melroe manufactured. McIntosh and his wife sued Melroe, claiming that a defect in the loader caused their injuries. Because it was undisputed that the loader was delivered to its initial user in 1980, some thirteen years before the incident involving McIntosh, Melroe filed a motion for summary judgment based upon the ten-year product liability statute of repose. The trial court granted summary judgment and the court of appeals affirmed.

Just as they did at the court of appeals, the McIntoshes and their *amici*<sup>11</sup> offered the supreme court a spirited and well-articulated attack on the product liability statute of repose. With respect to article 1, section 12 of the Indiana Constitution, the McIntoshes argued that the statute of repose impermissibly "abrogates all of the tort protections provided by the common law."<sup>12</sup> After initially recognizing that its earlier decision in *Dague v. Piper Aircraft Corp.*<sup>13</sup> might not have completely resolved the issue and that there is "no unique Indiana history surrounding the adoption" of section 12 in either 1816 or in its redrafting in 1851,<sup>14</sup> Justice Boehm's opinion made it clear that the statute of repose is consistent with each of Indiana's "differing lines" of section 12 doctrine:

In terms of pure civil procedural due process analysis, there is no issue. The bar of the statute of repose in the [IPLA] does not purport to regulate the procedure in the courts. Nor is the open courts requirement violated because, as *Dague* held, it remains the province of the General Assembly to identify legally cognizable claims for relief. If the law provides no remedy, denying a remedy is consistent with due course of law. Finally, there is no state constitutional 'substantive' due course of law violation because this legislation has been held to be, and we again hold it to be, rationally related to a legitimate legislative objective. It is

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alleged malpractice and her resulting injury. *See id.* at 1282-85.

8. 729 N.E.2d 972 (Ind. 2000).

9. *McIntosh v. Melroe Co.*, 682 N.E.2d 822 (Ind. Ct. App. 1997).

10. *See McIntosh*, 729 N.E.2d at 984.

11. Several prominent members of the Bar prepared an *amicus curiae* brief for the Indiana Trial Lawyers Association in support of the McIntoshes' arguments. The Indiana Defense Lawyers Association and the Product Liability Advisory Counsel prepared *amicus curiae* briefs in support of Melroe's arguments. *See id.* at 972.

12. *Id.* at 974.

13. 418 N.E.2d 207 (Ind. 1981).

14. *McIntosh*, 729 N.E.2d at 974.



debatable whether the [IPLA] eliminated a common law remedy, but even if it did, there is no substantive constitutional requirement that bars a statute from accomplishing that.<sup>15</sup>

The court rejected the McIntoshes' argument "that they have a constitutional right to a remedy for their injuries because the framers of the 1851 Constitution 'decided not to give the General Assembly broad powers to abolish the common law.'"<sup>16</sup> In essence, such an argument amounts to a "claim that common law remedies may not be abolished," a premise that the supreme court has "strongly" rejected.<sup>17</sup> Citing several Indiana cases including *Martin*,<sup>18</sup> *Dague*,<sup>19</sup> *Sidle v. Majors*,<sup>20</sup> and *Pennington v. Stewart*,<sup>21</sup> Justice Boehm wrote that the "Court has long recognized the ability of the General Assembly to modify or abrogate the common law."<sup>22</sup> In further elaborating, Justice Boehm noted:

[T]he legislature has the authority to determine what constitutes a legally cognizable injury." . . . [T]here is no "fundamental right" to bring a particular cause of action to remedy an asserted wrong. . . . Rather, because individuals have "no vested or property right in any rule of common law," the General Assembly can make substantial changes to the existing law without infringing on citizen rights. . . . Because no citizen has a protectable interest in the state of product liability law as it existed before the [IPLA], the General Assembly's abrogation of the common law of product liability through the statute of repose does not run afoul of the "substantive" due course of law provision of Article I, Section 12.<sup>23</sup>

Justice Boehm's opinion makes it clear that if article I, section 12 does not provide a remedy, the Indiana Constitution does not require one. Because the General Assembly earlier determined that injuries occurring ten years after the product was delivered to a user are not legally cognizable claims for relief, the McIntoshes were not entitled to a "remedy" under section 12. As such, the statute of repose

does not bar a cause of action; its effect, rather is to prevent what might otherwise be a cause of action from ever arising . . . . The injured party literally has *no* cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress.<sup>24</sup>

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15. *Id.* at 976.

16. *Id.* at 976-77.

17. *Id.* at 977.

18. *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999).

19. *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207 (Ind. 1981).

20. 341 N.E.2d 763, 775 (Ind. 1976).

21. 10 N.E.2d 619 (Ind. 1937).

22. *McIntosh*, 729 N.E.2d at 977.

23. *Id.* at 977-78 (internal citations omitted).

24. *Id.* at 978 (quoting *Lamb v. Wedgewood S. Corp.*, 302 S.E.2d 868, 880 (N.C. 1983)).



In contrast to the Medical Malpractice Act as applied in *Martin*, Justice Boehm recognized that in applying the IPLA to the case before the court, no one who has an accrued claim is foreclosed from asserting it. Foreclosing accrual of claims after a product has been in use for ten years is not an unreasonable exercise of legislative power, particularly in light of the fact that claims accruing in the last two years of the ten-year period may be brought within two years after accrual.<sup>25</sup> Accordingly, although the Indiana Constitution requires courts to be open to provide a remedy by due course of law, "legislation by rational classification to abolish a remedy is consonant with due course of law. If the law provides no remedy, Section 12 does not require that there be one."<sup>26</sup>

Although the court rejected the McIntoshes' argument that the Indiana Constitution precludes the legislature from modifying or eliminating a common law tort, the court's opinion nevertheless recognizes that the General Assembly's authority is not without limits. Thus, the final section 12 issue that Justice Boehm's opinion addresses is whether the product liability statute of repose is a rational means of achieving a legitimate legislative goal. After first recognizing that "Section 12 requires that legislation that deprives a person of a complete tort remedy must be a rational means to achieve a legitimate legislative goal[.]"<sup>27</sup>

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25. *See id.*

26. *Id.* at 979. Commenting about the dissent's conclusion that article I, section 12 guarantees to each citizen a substantive right to remedy for injuries suffered, Justice Boehm wrote that such a conclusion confuses "injury" with "wrong":

There is not and never has been a right to redress for every injury, as victims of natural disasters or faultless accidents can attest. Nor is there any constitutional right to any particular remedy. Indeed, as we have pointed out, some forms of "wrong" recognized at common law have long since been abolished by the legislature without conflict with the Indiana Constitution. . . . Ironically, the wrong the dissent contends in this case to be preserved by the constitution against legislative interference, strict liability for product flaws, did not exist in 1851; it was adopted as part of the [IPLA] in 1978. . . . This further underscores the point that the common law was not frozen in 1851 and is not chiseled in stone today. The dissent would imply that any judicially created tort remedy, even if non-existent until over 100 years after the adoption of the Indiana Constitution, cannot be abolished. Under this view, the door swings only one way: causes of action may be created at common law and by statute, but no cause of action, once it is created, may be eliminated.

As we observed in another context, the power to create is the power to destroy. . . . There is a fundamental difference between finding in the Indiana Constitution a requirement to preserve a specific substantive rule of law (which is the net effect of the dissent's position), and requiring that our courts be open to entertain claims based on established rules of law.

*Id.*

27. *Id.* Justice Boehm recognized that the "rational means" test is a variation on the substantive due process theme and imposes an overall test of rationality very similar to section 23's rational relationship requirement. *See id.* at 980.



Justice Boehm determined that the product liability statute of repose is such a rational means. Citing *Estate of Shebel v. Yaskawa Electric America, Inc.*,<sup>28</sup> the court reaffirmed its earlier pronouncement that the statute of repose "represents a determination by the General Assembly that an injury occurring ten years after the product had been in use is not a legally cognizable 'injury' that is to be remedied by the courts."<sup>29</sup> Such a decision is based on the legislature's "apparent conclusion that after a decade of use, product failures are 'due to reasons not fairly laid at the manufacturer's door.'"<sup>30</sup> Justice Boehm's section 12 analysis continued:

The statute also serves the public policy concerns of reliability and availability of evidence after long periods of time, and the ability of manufacturers to plan their affairs without the potential for unknown liability. The statute of repose is rationally related to meeting these legitimate legislative goals. It provides certainty and finality with a bright line bar to liability ten years after a product's first use. It is also rationally related to the General Assembly's reasonable determination that, in the vast majority of the cases, failure of products over ten years old is due to wear and tear or other causes not the fault of the manufacturer, and the substantial interest already identified warrant establishing a bright line after which no claim is created.<sup>31</sup>

Justice Boehm next turned his attention to the McIntoshes' claim that the product liability statute of repose violates article I, section 23<sup>32</sup> of the Indiana Constitution because it creates an impermissible distinction between tort victims injured by products more than ten years old and those injured by products less than ten years old. The McIntoshes also argued that the product liability statute of repose impermissibly grants a privilege to manufacturers of durable goods that

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28. 713 N.E.2d 275 (Ind. 1999).

29. *McIntosh*, 729 N.E.2d at 780.

30. *Id.* (quoting *Shebel*, 713 N.E.2d at 278). Only a few months before the *McIntosh* decision, Justice Sullivan articulated the policy underlying the Indiana General Assembly's enactment of the product liability statute of repose:

The policies underlying [the statute of repose] have been described as both a concern for the lack of reliability and availability of evidence after long periods of time and a public policy to allow manufacturers, after a lapse of a reasonable amount of time, to plan their affairs with a degree of certainty, free from unknown potential liability. Presumably there is also an underlying assumption that after ten years a product failure is due to reasons not fairly laid at the manufacturer's door. In any event, the legislature has determined that a product in use for ten years is no longer to be the source of its manufacturer's liability. The wisdom of this policy is for the legislature.

*Shebel*, 713 N.E.2d at 278 (internal citations omitted).

31. *McIntosh*, 729 N.E.2d at 980 (internal citations omitted).

32. The Indiana Constitution provides that "[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." IND. CONST. art. I, § 23.



is not available to manufacturers of non-durable goods.

After first pointing out that the "classification" in the product liability statute of repose is similar to most statutory classifications in that it "do[es] not define a group of persons by some innate characteristic," but rather "consequences to specified sequences of events that could touch anyone,"<sup>33</sup> Justice Boehm briefly reviewed the court's seminal section 23 decision, *Collins v. Day*.<sup>34</sup>

In applying *Collins*, the court first asked whether the product liability statute of repose is reasonably related to the inherent characteristics that define the distinction. The court answered the question in the affirmative. Justice Boehm pointed out that there is no statutory classification of claimants because "[a]nyone can present a claim and anyone can be barred by the statute, depending on what product is the source of the claim."<sup>35</sup> In that connection, Justice Boehm reiterated the policy basis supporting the statute of repose, namely the legislative determination that product failures occurring more than ten years after delivery to the first user are not fairly laid at the door of the manufacturer. Justice Boehm also cited the certainty and finality that a statute of repose provides by limiting the exposure of manufacturers to ten years after a product is first used. Accordingly, the distinction "between persons injured by products less than ten years old and those injured by products more than ten years old is rationally related to serving these legislative goals and is a permissible balancing of the competing interests involved."<sup>36</sup>

The second prong of the *Collins* section 23 analysis "requires that the preferential treatment provided by the statute of repose be uniformly applicable to all similarly situated persons."<sup>37</sup> The *McIntosh* majority agreed that the product liability statute of repose satisfies that requirement. "Unlike the plaintiff in *Martin* who had an otherwise valid tort claim but was unable to discover it within the statute of limitations," Justice Boehm explained, "the McIntoshes have never had a legally cognizable injury" because, on its face, the product liability statute of repose applies to everyone.<sup>38</sup> According to Justice Boehm, the statute prevents all citizens from accruing claims based on products in use longer than a decade and the McIntoshes are, therefore, treated no differently from any other

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33. *Id.* at 980-81.

34. 644 N.E.2d 72 (Ind. 1994).

35. *McIntosh*, 729 N.E.2d at 981. In responding to Justice Dickson's dissenting opinion, Justice Boehm took issue with Justice Dickson's belief that "'inherent characteristics of the people' differentiate the statutory treatments." *Id.* at 982. On that score, Justice Boehm wrote:

It is the characteristic, inherent or not, of the underlying products with which the 'people' come into contact that produce the differentiated result. To take *Collins* as an example, an agricultural worker and an industrial worker have no inherent characteristics. The industry in which they are employed is the basis of the distinction.

*Id.*

36. *Id.* at 981.

37. *Id.* at 982 (citing *Martin v. Richey*, 711 N.E.2d 1273, 1280 (Ind. 1999); *Collins*, 644 N.E.2d at 80).

38. *Id.* at 983.



person injured more than ten years after a product is first used or consumed.<sup>39</sup>

In an opinion that concurred in part and concurred in result in part, Justice Sullivan agreed that the product liability statute of repose does not violate sections 12 and 23, but he did so because, in his view, *Dague v. Piper Aircraft Corp.*<sup>40</sup> and *Beecher v. White*<sup>41</sup> are precedent worthy of adherence. He acknowledged that the court cited *Dague* approvingly in a section 12 context in the case of *State v. Rendleman*,<sup>42</sup> and that *Beecher* upheld the constitutionality under section 23 of a ten-year statute of repose for claims arising from architectural deficiencies.<sup>43</sup>

The salient question for Justice Sullivan was whether the court's 1999 decisions in *Martin* and its two related cases<sup>44</sup> would produce a result different from those in *Dague*, *Rendleman*, and *Beecher*. The answer, according to Justice Sullivan, is "no." With respect to section 12, *Martin* "requires that the plaintiff have 'an otherwise valid tort claim'" and reiterates "an important point made in *Rendleman* that 'the legislature has the authority to modify or abrogate common law rights provided that such change does not interfere with constitutional rights.'"<sup>45</sup> Because there is no valid product liability tort claim for a physical injury occurring after ten years from date of delivery to the initial user or consumer and because the harm allegedly suffered by the McIntoshes occurred outside of that period, Justice Sullivan agreed that the McIntoshes did not have the "otherwise valid tort claim" that *Martin* requires.<sup>46</sup>

With respect to section 23, Justice Sullivan's answer was also "no" because *Martin* recognizes that section 23 allows the legislature to create a statute of limitations in the Medical Malpractice Act so long as it is uniformly applicable to all medical malpractice victims.<sup>47</sup> From that, Justice Sullivan concluded that section 23 "is no impediment to the legislature creating a statute of repose in the [IPLA] so long as it is uniformly applicable to all products victims" and that the McIntoshes were treated no differently under the IPLA than "any other product victim whose injury occurs more than ten years after delivery of the product to an initial user or consumer."<sup>48</sup>

Justice Dickson, in a dissenting opinion joined by Justice Rucker, believed that the court should have held that the product liability statute of repose violates both sections 12 and 23. Justice Dickson's dissent began with his view of section

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39. See *id.*

40. 418 N.E.2d 207 (Ind. 1981).

41. 447 N.E.2d 622, 627 (Ind. Ct. App. 1983).

42. 603 N.E.2d 1333 (Ind. 1992).

43. See *McIntosh*, 729 N.E.2d at 984 (Sullivan, J., concurring).

44. See *Harris v. Raymond*, 715 N.E.2d 388 (Ind. 1999); *Van Dusen v. Stotts*, 712 N.E.2d 491 (Ind. 1999).

45. *McIntosh*, 729 N.E.2d at 984-85 (Sullivan, J., concurring) (quoting *Martin v. Richey*, 711 N.E.2d 1273, 1283 (Ind. 1999)).

46. *Id.* at 984.

47. See *id.* at 985.

48. *Id.*



12: "In choosing the language of [section 12, the framers of the Indiana Constitution] did not say that every person might have whatever remedy the common law or the legislature may allow from time to time, nor did they merely reiterate the language of the then-existing federal Due Process Clause."<sup>49</sup> Moreover, according to Justice Dickson, the framers did not craft section 12 merely to provide "due process."<sup>50</sup> Instead, the framers "unequivocally enhanced the protections" the Indiana Constitution affords, "expressly establishing the additional right to remedy for injuries suffered."<sup>51</sup>

After a brief history of section 12, which included references to other states' "remedies" provisions, the Magna Carta, and Chief Justice Marshall's opinion in *Marbury v. Madison*,<sup>52</sup> Justice Dickson concluded that the right to a remedy for injury is a "core value" that "the legislature may qualify but not alienate."<sup>53</sup> According to Justice Dickson:

While legislative qualifications of [the right to a remedy] may be enacted under the police power, the total abrogation of an injured person's right to remedy is an unacceptable material burden. The statute of repose provision in the [IPLA] is no mere qualification. It does not merely limit the time within which to assert a remedy, nor does it merely modify the procedure for enforcing the remedy. Nor is it a narrow, limited immunity necessitated by police power. On the contrary, the repose provision completely bars the courthouse doors to all persons injured by products over ten years old, even for claims alleging negligence, and even where the products were designed, built, sold, and purchased with the expectation of decades of continued use. Although this provision denies all Indiana citizens access to justice ensured by the Right to Remedy Clause, it is especially pernicious to those economically disadvantaged citizens who must rely on older or used products rather than new ones.<sup>54</sup>

Justice Dickson began his section 23 analysis just as did Justice Boehm, by citing *Collins* and its two-part test. Justice Dickson concluded, however, that the product liability statute of repose violates the first *Collins* requirement "[b]y artificially distinguishing as a separate class those citizens injured by defective products more than ten years old, and by forbidding them access to legal recourse for their injuries."<sup>55</sup> Justice Dickson believed that the majority's misapplication

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49. *Id.* at 986 (Dickson, J., dissenting).

50. *Id.*

51. *Id.*

52. 5 U.S. (1 Cranch) 137 (1803).

53. *McIntosh*, 729 N.E.2d at 987-88 (citing *Price v. State*, 622 N.E.2d 954, 960 (Ind. 1993) (Dickson, J., dissenting)).

54. *Id.* at 989-90 (citations omitted).

55. *Id.* at 991. The problem, according to Justice Dickson, was with the first of the two *Collins* sub-elements, which requires that classification be "based upon distinctive, inherent characteristics that rationally distinguish the unequally treated classes." *Id.*



of *Collins* “beg[an] with its focus upon unequal treatment of different classes of *products*, rather than upon unequally treated classes of *people*.”<sup>56</sup> On that point, Justice Dickson wrote:

When a statute is challenged as violating Section 23, we must evaluate the disparate treatment afforded to the benefited or burdened class. Products are not sued; they do not receive immunity from suit under the statute; and thus, they receive neither a benefit nor a burden. It is *people* who receive unequal treatment under the statute.

Perhaps because it focuses upon products rather than people, the majority bypasses the required threshold question as to whether the legislative classification is based upon distinctive, inherent characteristics that rationally distinguish the unequally treated classes. This is sub-element (1) of the first of the two *Collins* requirements. The majority fails to consider this prerequisite question. It is only when the classification is based upon inherent distinctions that the analysis can proceed to evaluate whether the disparate treatment is reasonably related to the characteristics distinguishing the classifications.<sup>57</sup>

After explaining why “the Indiana Constitution demands more than simply a rational relationship between the legislative goal and the classification,”<sup>58</sup> Justice Dickson concluded as follows:

The unequal treatment provided by the repose provision of the [IPLA] is wholly unrelated to any distinctive, inherent characteristics that rationally distinguish the unequally treated classes of people. In other words, there is nothing that naturally inheres in the group of people designated for unequal treatment that separates them into distinctive classes. The *parties* who are injured by defective products more than ten years old do not necessarily differ from the *parties* who are injured by such products that are only nine years old. The ten-year product age line does not distinguish classes of people based upon their inherent characteristics. Using such a line as a basis to treat unequally different classes of people clearly violates both the language and the spirit of Section 23.

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[The product liability statute of repose] takes a natural class of persons (users or consumers of a product), splits that class in two, designates the dissevered factions of the original unit as two classes (persons injured by a product within ten years of its delivery and persons

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56. *Id.* at 991-92 (emphasis in original).

57. *Id.* at 992 (footnote omitted).

58. *Id.*



injured by products more than ten years after its delivery), and enacts different rules unequally governing each. Such discrimination is unconstitutional.<sup>59</sup>

In the wake of *McIntosh*, practitioners are calling upon Indiana courts to resolve the applicability of the ten-year product liability statute of repose in the context of product liability cases alleging exposure to asbestos-containing products. The issue is pending before the Indiana Court of Appeals in several cases.

Indiana practitioners continue to argue about the applicable limitations and repose periods in asbestos cases. The genesis of the controversy is the statute now codified as Indiana Code section 34-20-3-2, which provides that "[a] product liability action that is based on (1) property damage resulting from asbestos; or (2) personal injury, disability, disease, or death resulting from exposure to asbestos must be commenced within two (2) years after the cause of action accrues."<sup>60</sup> That exception applies, however, "only to product liability actions against: (1) persons who mined and sold commercial asbestos; and (2) funds that have, as a result of bankruptcy proceedings or to avoid bankruptcy proceedings, been created for the payment of asbestos related disease claims or asbestos related property damage claims."<sup>61</sup>

The crux of the debate concerns the phrase "persons who mined and sold commercial asbestos." Plaintiffs argue that the "and" should be read as an "or," while defendants contend that the statute applies to create an exception to the limitations and repose periods only for claims against those entities that both mined *and* sold commercial asbestos. Two years ago, in *Sears Roebuck & Co. v. Noppert*,<sup>62</sup> the court of appeals addressed the applicability of the ten-year product liability statute of repose in the context of a claim for alleged exposure to asbestos. The *Noppert* court did so as part of a larger discussion about the timeliness of a motion to correct errors pursuant to Rule 60(B) of the Indiana Rules of Trial Procedure.<sup>63</sup>

The second prong of the court of appeals' analysis focused upon the propriety of the Nopperts' defense at trial because Indiana law required them to show that they had a "meritorious defense" to Sears' summary judgment motion if the court was to consider their motion to correct errors to be a Trial Rule 60(B) motion.<sup>64</sup> The *Noppert* court concluded that, as a matter of law, the Nopperts did not have a meritorious defense because the exception to the ten-year product

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59. *Id.* at 993-94.

60. IND. CODE § 34-20-3-2 (1998) (formerly IND. CODE § 33-1-1.5-5.5). The statute further provides that an action accrues "on the date when the injured person knows that the person has an asbestos related disease or injury" and that the "subsequent development of an additional asbestos related disease or injury is a separate cause of action." *Id.*

61. *Id.*

62. 705 N.E.2d 1065 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 300 (Ind. 1999).

63. *See id.* at 1066-67.

64. *Id.* at 1067.



liability statute of repose contained in Indiana Code section 34-20-3-2 applies only to claims against persons who mined and sold commercial asbestos and against funds described in that section.<sup>65</sup> With respect to the first category of defendants (miners and sellers), the court made it clear that the entities to which the statute applies are entities that both mined *and* sold commercial asbestos: "[W]hile courts in Indiana have on occasion construed an 'and' in a statute to be an 'or,' we find that there is no ambiguity in this statute requiring such an interpretation."<sup>66</sup> Because the court determined that Sears did not fall into either category, the "discovery" exception did not apply to it.<sup>67</sup>

Because of the procedural context in which the court of appeals addressed the substantive issue, asbestos plaintiffs and their counsel have since argued that the substantive discussion in the court's opinion is merely *obiter dicta*. Whether the ten-year product liability statute of repose applies to claims alleging asbestos-related injuries is an intriguing question in light of the Indiana Supreme Court's decisions in *McIntosh*, *Covalt*, *Martin*, and *Van Dusen*, and in light of the fact that some asbestos-related injuries can take years to develop. Practitioners await the court's decisions in several pending cases and further guidance in this area.

## II. CASES INTERPRETING STATUTORY DEFINITIONS

In Indiana, all claims filed by users or consumers<sup>68</sup> against manufacturers<sup>69</sup>

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65. See *id.* The Nopperts argued that the asbestos "discovery" statute is an exception to the application of the ten-year statute of repose in asbestos cases. In doing so, the Nopperts relied, in part, on the Indiana Supreme Court's decision in *Covalt v. Carey Canada, Inc.*, 543 N.E.2d 382 (Ind. 1989). See *Noppert*, 705 N.E.2d at 1067.

66. *Id.* at 1068 (footnote omitted).

67. See *id.* On petition to transfer to the Indiana Supreme Court, the Nopperts argued, in part, that the court of appeals' interpretation of Indiana Code section 33-1-1.5-5.5 violated article I, sections 12 and 23 of the Indiana Constitution. The Indiana Supreme Court denied transfer on August 18, 1999, without issuing an opinion. See *Sears Roebuck & Co. v. Noppert*, 726 N.E.2d 300 (Ind. 1999).

68. The IPLA defines "consumer" as:

(1) a purchaser; (2) any individual who uses or consumes the product; (3) any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question; or (4) any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.

IND. CODE § 34-6-2-29 (1998). "User" has the same meaning as "consumer." See *id.* § 34-6-2-147.

69. "Manufacturer" is defined as "a person or an entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of the product to a user or consumer." *Id.* § 34-6-2-77(a). "Manufacturer" also includes a seller who:

(1) has actual knowledge of a defect in a product; (2) creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the



and sellers<sup>70</sup> for physical harm<sup>71</sup> caused by a product<sup>72</sup> are statutory. The IPLA governs all such claims “regardless of the substantive legal theory or theories upon which the action is brought.”<sup>73</sup> The 1995 amendments to the IPLA incorporated negligence principles in cases in which claimants base their theory of liability upon either defective design or inadequate warnings.<sup>74</sup> “Strict liability” remains only in cases in which the theory of liability is a manufacturing defect.<sup>75</sup> The 1995 amendments also limited actions against sellers,<sup>76</sup> more specifically defined the circumstances under which a distributor or seller could be deemed a manufacturer,<sup>77</sup> converted the traditional state of the art defense into a rebuttable presumption,<sup>78</sup> and injected comparative fault principles into product

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manufacturing process; (3) alters or modifies the product in any significant manner after the product comes into the seller’s possession and before it is sold to the ultimate user or consumer; (4) is owned in whole or significant part by the manufacturer; or (5) owns in whole or significant part the manufacturer.

*Id.* § 34-6-2-77(a).

70. “Seller” is defined as “a person engaged in the business of selling or leasing a product for resale, use, or consumption.” *Id.* § 34-6-2-136.

71. “Physical harm” is defined as “bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property.” *Id.* § 34-6-2-105(a). It does not include “gradually evolving damage to property or economic losses from such damage.” *Id.* § 34-6-2-105(b).

72. “Product” is defined as “any item or good that is personalty at the time it is conveyed by the seller to another party.” *Id.* § 34-6-2-114(a). “The term does not apply to a transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product.” *Id.* § 34-6-2-114(b).

73. *Id.* § 34-20-1-1.

74. *See id.* § 34-20-2-2.

75. *See id.* The editors of *Burns Indiana Statutes Annotated* have included a title that could be misleading to their readers. The short title the editors have chosen for section 34-20-2-2 is “Strict Liability—Design Defect.” *See* IND. CODE § 34-20-2-2 (2000). The juxtaposition of the terms in that title might cause a reader to incorrectly assume that the statute provides for strict liability in design defect cases.

76. *See* IND. CODE § 34-20-2-3 (1998).

77. *See id.* § 34-20-2-4.

78. *See id.* § 34-20-5-1. The presumption is that the product causing the physical harm is not defective and that the product’s manufacturer is not negligent. *See id.* The IPLA entitles a manufacturer or seller to such a presumption if,

before the sale by the manufacturer, the product: (1) was in conformity with the generally recognized state of the art applicable to the safety of the product at the time the product was designed, manufactured, packaged, and labeled; or (2) complied with applicable codes, standards, regulations, or specifications established, adopted, promulgated, or approved by the United States or by Indiana, or by any agency of the United States or Indiana.

*Id.*



liability cases.<sup>79</sup>

For these reasons, cases interpreting the IPLA are of the utmost importance. The following cases decided during the survey period define and interpret terms to which the IPLA refers.

#### A. User or Consumer

In *Butler v. City of Peru*,<sup>80</sup> the Indiana Supreme Court granted transfer specifically "to clarify the phrase 'user or consumer' in the [IPLA]."<sup>81</sup> James Butler, a maintenance worker for Peru Community School Corporation, was electrocuted in September 1993 while trying to restore power to an electrical outlet near the Peru High School baseball field. The baseball field's electrical equipment was installed around 1970.

James Butler's wife and estate sued the City of Peru and Peru Municipal Utilities, alleging ten counts of negligence. The trial court granted summary judgment for the defendants, and the court of appeals affirmed.<sup>82</sup>

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79. The 1995 amendments changed Indiana law with respect to fault allocation and distribution in product liability cases. *See id.* at § 34-20-7-1. The Indiana General Assembly made it clear that "a defendant is not liable for more than the amount of fault . . . directly attributable to that defendant," as determined pursuant to section 34-20-8, nor can a defendant "be held jointly liable for damages attributable to the fault of another defendant." *Id.* § 34-20-7-1.

The 1995 amendments now require the trier of fact to compare "the fault of the person suffering the physical harm, as well as the fault of all others who caused or contributed to cause the harm." *Id.* § 34-20-8-1(a). The statute requires that the trier of fact compare such fault "in accordance with IC 34-57-2-7, IC 34-57-2-8, or IC 34-57-2-9." Those references appear to be incorrect cross-references. Article 51 of Title 34 contains Indiana's Comparative Fault Act. Sections 34-51-2-7 to -9 of the Indiana Code are, therefore, most likely the statutory provisions to which the statute intends to refer. The IPLA mandates that:

[i]n assessing percentage of fault, the jury shall consider the fault of all persons who contributed to the physical harm, regardless of whether the person was or could have been named as a party, as long as the nonparty was alleged to have caused or contributed to cause the physical harm.

*Id.* § 34-20-8-1(b).

Practitioners also should recognize that the definition of "fault" for purposes of the IPLA is not the same as the definition of "fault" applicable in actions governed by the Comparative Fault Act. *Compare* IND. CODE § 34-6-2-45(a) (1998), *with* IND. CODE § 34-6-2-45(b) (1998). For purposes of the IPLA, the definition of "fault" does not include the "unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages." *Id.* § 34-6-2-45(b).

80. 733 N.E.2d 912 (Ind. 2000).

81. *Id.* at 914. The court also granted transfer to "reiterate the correct standard for summary judgment under Trial Rule 56." *Id.*

82. *See id.* at 914-15. The theory of negligence was based upon "the close proximity of high power lines to low power lines and the lack of any proper warning regarding, or insulation of, the high power lines." *Id.* at 914.



The supreme court's opinion focused first on Indiana's summary judgment standard in the context of negligence and duty issues.<sup>83</sup> The court next turned its attention to the IPLA. Indiana Code section 34-20-2-1 provides, in relevant part:

[A] person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user's or consumer's property is subject to liability for physical harm caused by that product to the user or consumer . . . if . . . that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition . . . .<sup>84</sup>

The trial and appellate courts both concluded that James Butler was not a "user or consumer" of a product under the IPLA because he simply did not fit within any of the foregoing definitions.<sup>85</sup> The court of appeals reasoned that James Butler was not a purchaser of the product, that he did not consume the product, that he did not possess it while acting on behalf of an injured party, and that he was not a bystander. Thus, the only definition of consumer that conceivably could apply to James Butler was "any individual who uses . . . the product."<sup>86</sup> Quoting *Thiele v. Faygo Beverage, Inc.*,<sup>87</sup> the court of appeals reiterated that the "legislature intended 'user or consumer' to characterize those who might foreseeably be harmed by a product at or after the point of its retail sale or equivalent transaction with a member of the consuming public."<sup>88</sup> In light of *Thiele*, the court determined that James Butler was not a "user" of the electricity product, and that the trial court did not err in determining that the

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83. See *id.* at 915-18.

84. IND. CODE § 34-20-2-1 (1998).

85. See *supra* note 68 for a discussion of "user" and "consumer." The court of appeals rather narrowly phrased the product liability issue as whether the IPLA applies "when an electrical utility customer's employee is injured on the customer's premises by a defect in an electrical installation" the utility did not perform. *Butler v. City of Peru*, 714 N.E.2d 264, 265 (Ind. Ct. App. 1999), *vacated by* 733 N.E.2d 912 (Ind. 2000). The court of appeals agreed with the trial court that the IPLA did not apply because "James Butler was not a 'consumer'" of electricity. *Id.* at 267. In doing so, the court was quick to point out that "electricity can be a 'product' within the meaning of the [IPLA]," and that "[d]etermining whether a plaintiff is a consumer within the meaning of the [IPLA] is a pure question of law." *Id.* at 267 (citing *Pub. Serv. of Ind., Inc. v. Nichols*, 494 N.E.2d 349 (Ind. Ct. App. 1986)). According to the court of appeals,

of all of the potential plaintiffs who might be injured by a defective product, those that have been granted the protection of the [IPLA] has been doubly limited to (1) users and consumers (2) whom the seller should reasonably foresee as being subject to the harm caused by the product's defective condition.

*Id.*

86. *Id.* at 268.

87. 489 N.E.2d 562 (Ind. Ct. App. 1986).

88. *Butler*, 714 N.E.2d at 268 (quoting *Theile*, 489 N.E.2d at 586).



IPLA did not apply.<sup>89</sup>

Although the Butlers did not technically present a claim governed by the post-1995 IPLA, the supreme court nevertheless took the opportunity to address the IPLA issue.<sup>90</sup> The supreme court agreed that the Butlers had no viable claim under the IPLA, but not because James Butler was not a "user or consumer." According to the supreme court, "the [s]chool was the ultimate user of the electrical transmission system and the electricity. As an employee of a 'consuming entity,' Butler falls under the definition of 'user or consumer' established in *Thiele*."<sup>91</sup>

The court then concluded as follows:

We do not suggest that Peru had any exposure under the [IPLA]. Although Peru obviously furnished the electricity within the [IPLA]'s period of limitations, the same is not true of the electrical equipment regardless of Peru's role in its manufacture, design, or construction. Peru is correct that the baseball field electrical equipment was installed in approximately 1970—well over the ten-year statute of repose for the [IPLA]. Accordingly, no claim may be brought under the [IPLA] on the basis of defects in that equipment.<sup>92</sup>

Practitioners may recall that the Indiana Supreme Court recently addressed the issue of who qualifies as a "user or consumer" for purposes of applying the ten-year product liability statute of repose. In *Estate of Shebel v. Yaskawa Electric America, Inc.*,<sup>93</sup> the court held "that a 'user or consumer' under [the IPLA] includes a distributor who uses the product extensively for demonstration purposes" and that the repose period commences with delivery for such a use.<sup>94</sup>

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89. *See id.*

90. *See Butler v. City of Peru*, 733 N.E.2d 912, 918 (Ind. 2000). The Butlers filed their complaint on January 13, 1995. *See id.* The applicable law was, therefore, the pre-1995 version of the IPLA, which governed only those "actions in which the theory of liability is strict liability in tort." IND. CODE § 33-1-1.5-1 (1993). None of the Butlers' claims was based upon strict liability. Indeed, the Butlers apparently conceded in their briefs to the trial court and to the court of appeals that the IPLA did not apply because there was no "product" involved. *Butler*, 733 N.E.2d at 918 n.3. The Butlers "changed tactics" and argued to the supreme court that the IPLA "did apply because electricity was a product although the wiring was not." *Id.*

91. *Butler*, 733 N.E.2d at 919.

92. *Id.* (citing *McIntosh v. Melroe*, 729 N.E.2d 972 (Ind. 2000)). Although the *Butler* court recognized that electricity might be considered a "product" under the IPLA, the Butlers did not offer any theory about "why the electricity—as distinct from the configuration of the equipment—was defective or unreasonably dangerous." *Id.* Accordingly, there simply was no evidence that the electricity at issue could be considered a "product in a defective condition unreasonably dangerous to any user or consumer." *Id.* (citing IND. CODE § 34-20-2-1 (1998)).

93. 713 N.E.2d 275 (Ind. 1999).

94. *Id.* at 276.



### B. The Property Damage Cases

Four cases decided by the court of appeals during the survey period, *Interstate Cold Storage, Inc. v. General Motors Corp.*,<sup>95</sup> *I/N Tek v. Hitachi, Ltd.*,<sup>96</sup> *Progressive Insurance Co. v. General Motors Corp.*,<sup>97</sup> and *Hitachi Construction Machinery Co. v. Amax Coal Co.*,<sup>98</sup> all confirmed that the IPLA does not allow a claimant to recover for damages to the defective product itself.

In *Interstate*, a General Motors (GM) vehicle caught fire and was declared a total loss. The Interstate employee driving the vehicle at the time was not injured and no other property was damaged as a result of the fire. Interstate sued GM, alleging strict liability, negligence, and breach of warranty.<sup>99</sup> GM moved for summary judgment, arguing that the IPLA does not permit recovery when the only damage suffered is to the allegedly defective product itself. The trial court agreed and granted summary judgment to GM with respect to the strict liability and negligence claims.<sup>100</sup> In doing so, the trial court found that the IPLA's "physical harm" requirement "means bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden major damage to property other than to the product itself."<sup>101</sup> Interstate appealed. "Physical harm" for purposes of the IPLA means "bodily injury, death, loss of services, and rights arising from any such injuries as well as sudden, major damage to property. The term does not include gradually evolving damage to property or economic loss from such damage."<sup>102</sup>

After recognizing that the parties did not dispute that the damage to the vehicle involved was "sudden" and "major," the *Interstate* court turned to the case of *Martin Rispens & Son v. Hall Farms, Inc.*,<sup>103</sup> for guidance. There, the Indiana Supreme Court held that "[e]conomic losses are not recoverable in a negligence action premised on the failure of a product to perform as expected unless such failure causes personal injury or physical harm to property other than the product itself."<sup>104</sup>

In the *Martin Rispens* case, the plaintiff's loss was a gradually evolving damage, which Interstate noted is specifically excluded from the IPLA's

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95. 720 N.E.2d 727 (Ind. Ct. App. 1999).

96. 734 N.E.2d 584 (Ind. Ct. App. 2000).

97. 730 N.E.2d 218 (Ind. Ct. App. 2000).

98. 737 N.E.2d 460 (Ind. Ct. App. 2000).

99. See *Interstate Cold Storage, Inc.*, 720 N.E.2d at 729.

100. See *id.* GM moved for summary judgment on the breach of warranty claim as well. GM withdrew that part of the summary judgment motion at the hearing. After the trial court granted summary judgment on the two other counts, the parties jointly stipulated to dismiss with prejudice the breach of warranty count. See *id.* at 729 n.1.

101. *Id.* at 730 (emphasis in original).

102. IND. CODE § 34-6-2-105 (1998).

103. 621 N.E.2d 1078 (Ind. 1993).

104. *Id.* at 1091.



definition of "physical harm."<sup>105</sup> Accordingly, Interstate argued that application of the "economic loss" rule articulated in *Martin Rispens* should be limited to the facts of that case and should be read to mean only that the IPLA is inapplicable to claims of gradually evolving damage to the product itself.<sup>106</sup> The court of appeals disagreed:

It may well be that the supreme court intended its statements in *Martin Rispens* to encompass only the gradually evolving damage found in that case, although they are not by their express terms so limited. However, the language of the [IPLA] supports an extension of that statement to even the "sudden, major damage" we have here. The [IPLA] states that the manufacturer of a *product* is liable for physical harm caused by that *product* to the user's *property*. Thus, although it is possible in general terms for the product to also be the property of the user, the [IPLA] does not use the terms "product" and "property" interchangeably. The language of the [IPLA] contemplates the defective product action on some other property causing some harm to it. Accordingly, we must disagree with Interstate's contention that "the [IPLA] does not draw any distinction between the product itself and other property owned by the user or consumer . . . ." The trial court did not err in granting summary judgment as a matter of law for GMC on Interstate's claims under the [IPLA].<sup>107</sup>

A short time after *Interstate*, another panel of the court of appeals faced essentially the same issue in *I/N Tek v. Hitachi, Ltd.*<sup>108</sup> In that case, Hitachi supplied equipment that comprised a tandem steel mill operated by I/N Tek. The tandem mill consisted of four internal chambers or "stands," through which steel passed during processing. Each stand contained several work rolls, which the court described as cylindrical parts that move the steel through the mill. Attached to the back of the housing was a reel, onto which the steel was wound after passing through all four stands. The four internal stands and the reel were component parts that were not severable from the mill and unable to function in a stand-alone capacity. In February of 1995, a shaft attached to a pinion gear in one of the stands failed, causing damage to the tandem mill and its component parts. No person was injured.<sup>109</sup>

As a result of the incident, I/N Tek sued Hitachi, alleging product liability and negligence. Hitachi moved for summary judgment, arguing that the IPLA precluded I/N Tek from recovering because it suffered no damage other than to the tandem mill itself.<sup>110</sup> The trial court agreed with Hitachi, finding that I/N Tek

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105. See *Interstate Cold Storage, Inc.*, 720 N.E.2d at 731.

106. See *id.*

107. *Id.* (emphasis added) (internal citations omitted).

108. 734 N.E.2d 584 (Ind. Ct. App. 2000).

109. See *id.* at 585-86. Although no one suffered personal injuries, a steel coil owned by Inland Steel Company was in process at the time of the incident and was damaged. See *id.* at 586.

110. See *id.*



did not suffer any damage to real or personal property separate and apart from damage to the mill itself. According to the trial court, the fact that some of the damaged component parts were replacement parts not manufactured by Hitachi did not "alter the undisputed fact that they were part and parcel of the 'product,' the Number 1 Mill Stand."<sup>111</sup>

On appeal, *I/N Tek* argued that when damage is "sudden and major" the IPLA allows recovery regardless of whether only the product itself or the product in addition to other property is damaged.<sup>112</sup> The court of appeals first acknowledged that the essential issue for the trial court was whether the IPLA applies to damage to the defective article itself, which ultimately led to its conclusion that "property" is separate from the "product."<sup>113</sup> Just as was the case in *Interstate*, the *I/N Tek* court examined the IPLA definitions of "physical harm" and "product," in addition to Indiana Code section 34-20-2-1.<sup>114</sup> The court quickly pointed out that *I/N Tek*'s argument was the same as the one that failed in *Interstate*. The *I/N Tek* court reasoned that the language of the IPLA itself, together with the *Martin Rispens* holding, compelled the same decision as the one reached in *Interstate*: the IPLA requires damage to property other than the product itself.<sup>115</sup>

Moving beyond the threshold question, the *I/N Tek* court recognized that there was an "other property" issue to be resolved.<sup>116</sup> In *Interstate*, the only property damaged was the allegedly defective property itself. In the case before it, however, *I/N Tek* designated evidence that some of the damaged component parts of the tandem mill were replacement parts not manufactured by Hitachi. *I/N Tek* argued that those parts should be viewed as "other property." The court of appeals disagreed, citing the U.S. Supreme Court's decision in *East River Steamship Corp. v. Transamerica Delaval, Inc.*<sup>117</sup> as compelling authority.<sup>118</sup> The court ultimately concluded as follows:

Although the parts were not originally part of the tandem mill and were not manufactured by Hitachi, they were integral to the mill. None of the component parts of the mill, including the replacement parts, were able to stand alone. We consider "other property" to be that which is wholly outside and apart from the product itself. Thus, the damage caused to the replacement parts of the tandem mill is not sufficient to constitute physical harm to *I/N Tek*'s property within the meaning of [the IPLA], and the trial court did not err in granting Hitachi's motion for summary

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111. *Id.*

112. *Id.* at 587.

113. *Id.*

114. *See id.*

115. *See id.*

116. *Id.* at 588.

117. 476 U.S. 858 (1986).

118. *See I/N Tek*, 734 N.E.2d at 588.



judgment.<sup>119</sup>

A little more than a month after the decision in *I/N Tek*, the court of appeals revisited the property damage issue. In *Progressive Insurance Co. v. General Motors Corp.*,<sup>120</sup> three insurance companies sued automobile manufacturers General Motors and Ford in subrogation in five separate cases after vehicles were destroyed in fires. In each instance, the vehicles themselves were the only property damaged in the fires. The trial court granted some of the motions for summary judgment and denied some others. A consolidated appeal ensued.<sup>121</sup>

The question before the court of appeals was "whether the insurance companies, by subrogation, may recover in tort under theories of strict liability and negligence for damage sustained by the vehicles after they caught fire. Specifically, the issue was whether the [IPLA] allows recovery for this type of loss."<sup>122</sup> As in *Interstate*, the defendants argued that because the damage was "sudden and major," they were entitled to summary judgment for claims based upon the IPLA because the insurance companies could not recover for a purely economic loss to the property (vehicles) themselves.<sup>123</sup>

As did the courts in *Interstate* and *I/N Tek*, the *Progressive* court first cited both Indiana Code section 34-20-2-1 and the definition of "physical harm."<sup>124</sup> The *Progressive* court next discussed *Martin Rispens*, recognizing as follows:

Barring recovery under the [IPLA] when only the product itself is damaged is founded upon the core separation between tort law and contract law. The distinction is based upon a manufacturer's differing responsibilities in placing its product into the stream of commerce and the balancing of risks. While a manufacturer should be held liable if its product causes physical harm to a person or other property, it should not be held accountable if its product does not perform to the consumer's economic expectations unless the manufacturer guarantees the product's performance. If the manufacturer guarantees performance, then it undertakes the risk of loss, and that allocation of risk is best handled by contract principles including warranty law.<sup>125</sup>

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119. *Id.*

120. 730 N.E.2d 218 (Ind. Ct. App. 2000).

121. *See id.* at 219. The three insurers were Progressive Insurance Co., United Farm Bureau Insurance Co., and Foremost Insurance Co. The vehicles involved included a 1994 GMC Jimmy, a 1992 Ford F450, a Chevrolet C1500 Suburban, a Newmar Motor Home containing a Ford chassis and engine, and a 1995 Ford F600. In four of the five situations, defective wiring allegedly caused the fires. In the other case, a defective fuel line allegedly caused the fire. In one of the defective wiring cases, the insurer also alleged defects in the fuel line and transmission line. *See id.*

122. *Id.* at 219-20 (footnote omitted).

123. *Id.* at 220.

124. *See id.*

125. *Id.* (internal citations omitted). The court also cited secondary sources in further support of its reasoning. *See* Jay M. Zitter, Annotation, *Strict Products Liability: Recovery for Damage to Product Alone*, 72 A.L.R. 4th 12 (1989 & Supp. 1999); 63B AM. JUR. 2D *Products Liability* §§



Although acknowledging *Interstate* and recognizing Justice Krahulik's decisions in *Martin Rispens*, and *Reed v. Central Soya Co.*,<sup>126</sup> the *Progressive* court nevertheless seemed troubled by "the proposition that a consumer may not recover under the [IPLA] for damage caused by a defective product unless the product also damages other property or injures a person."<sup>127</sup> Because, as the court wrote, it was not "at liberty to recast [Justice Krahulik's] opinions," it was constrained to affirm the trial court's entry of summary judgment for GM in two of the cases and to reverse the denials of summary judgment in the other three.<sup>128</sup>

The *Progressive* court continued, however, acknowledging that the IPLA "seems to allow more than one interpretation" and that the statute's use of the terms "product" and "property" is probably meaningless to consumers, most of whom consider all of their belongings to be property.<sup>129</sup> The court also recognized that barring recovery for damage to the product itself leaves both remote users and original purchasers without a remedy. While conceding that consumers have other ways to recover, such as a manufacturer's warranty, the court was concerned about the "practical reality" that some remote users who do not purchase the vehicle directly from the manufacturer might not have recourse.<sup>130</sup> The court was equally concerned about original purchasers who may "find themselves without a remedy if they do not comport with strict warranty requirements. It may be considered inequitable to leave such a large number of consumers without a remedy, while allowing manufacturers who have placed a defective product in the market to remain free from liability."<sup>131</sup>

Openly troubled by what it called the "illogical" justification underlying the economic damage rule—"that consumers have other options of recourse when the product itself is damaged"—the *Progressive* court pointed out that when "other property" is damaged by a defective product, "consumers do not have any other method by which to recover for their loss."<sup>132</sup> To illustrate its point, the court posed the following "practical situation":

[A] consumer who owns two vehicles, one Ford and one GM, stores them beside each other in his garage. The Ford begins smoking due to defective wiring, and the resulting fire destroys both the Ford and the GM and causes damage to the garage. Under current law, this consumer could recover under the [IPLA] for the damage caused to his GM and his garage, but he could not recover for the Ford, which originated the fire. After putting the [IPLA]'s seemingly bright line rule into practice, it seems incongruous that if one had two cars parked beside each other,

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1912-30 (1997 & Supp. 1999).

126. 621 N.E.2d 1069 (Ind. 1993), *modified on other grounds by* 644 N.E.2d 84 (Ind. 1994).

127. *Progressive Ins. Co.*, 730 N.E.2d at 221.

128. *Id.*

129. *Id.*

130. *See id.* at 221-22.

131. *Id.* at 222.

132. *Id.*



that he could recover for one and not the other.<sup>133</sup>

In yet another pronouncement on the property damage issue, the court of appeals in *Hitachi Construction Machinery Co., v. AMAX Coal Co.*,<sup>134</sup> joined *Interstate*, *I/N Tek*, and *Progressive* in holding that the IPLA provides recovery only for damage to property other than the defective product itself.<sup>135</sup> AMAX purchased an excavator manufactured by Hitachi. One of Hitachi's authorized dealers equipped the excavator with a custom-fitted fire suppression system before delivery. The excavator sustained heavy damage from a fire when the fire suppression system activated, but failed to extinguish the fire.<sup>136</sup>

Both AMAX's and Hitachi's experts agreed that the fire began in the rear of the excavator where the fan sprayed hydraulic fluid onto the hot engine turbochargers. AMAX sued Hitachi, claiming that design defects in the excavator caused the fire.<sup>137</sup> Hitachi tried mightily to dispose of the case before trial. Hitachi first filed a motion to dismiss and later a motion for summary judgment, both of which the trial court denied. Hitachi then twice filed motions for judgment on the evidence during the jury trial. Hitachi appealed after a jury verdict against it.<sup>138</sup>

On appeal, Hitachi argued, as it had in the trial court, that AMAX could not recover under the IPLA for a strictly economic loss to its excavator and that the fire suppression system did not constitute "other property." The court of appeals agreed, reversing the trial court's decision not to dispose of the case to the extent that AMAX's claims were based upon the IPLA.<sup>139</sup> As did the previous panels deciding the issue, the *Hitachi* court began its analysis by examining Indiana Code section 34-20-2-1, the IPLA's definition of "physical harm," and the case law definition of "sudden, major damage."<sup>140</sup> Citing *Progressive* and *Martin Rispens*, the *Hitachi* court recognized that "a person may not recover for 'sudden, major damage[,] 'caused by a defective product unless the product also damages other property or injures a person.'"<sup>141</sup> Citing both *I/N Tek* and *Interstate*, the court reiterated that "other property" is that which is "wholly outside and apart from the product itself" and that the IPLA "does not use the terms 'product' and 'property' interchangeably [because it] 'contemplates the defective product

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133. *Id.*

134. 737 N.E.2d 460 (Ind. Ct. App. 2000).

135. *See id.* at 463-64.

136. *See id.* at 462.

137. *See id.* Specifically, AMAX argued that Hitachi's excavator was designed defectively because of, "(1) insufficient turbocharger shielding, (2) improper routing of hydraulic lines, and (3) failure to include a check valve on the fast fill line which allowed the fuel tank to feed the fire." *Id.*

138. *See id.*

139. *See id.* at 462, 465-66.

140. *Id.* at 463. Compare *Progressive Ins. Co.*, 730 N.E.2d at 219-20, and *Interstate Cold Storage, Inc. v. Gen. Motors Corp.*, 720 N.E.2d 727, 730 (Ind. Ct. App. 1999).

141. *Hitachi Constr. Mach. Co.*, 737 N.E.2d at 463.



acting on some other property causing some harm to it.”<sup>142</sup>

After a brief analysis of *I/N Tek*<sup>143</sup> and the U.S. Supreme Court’s decision in *Saratoga Fishing Co. v. J.M. Martinac & Co.*,<sup>144</sup> the *Hitachi* court noted that AMAX extensively negotiated with Hitachi’s dealer for an excavator with a custom-fitted fire suppression system and received a “bargained for” product equipped with such a fire suppression system.<sup>145</sup> In addition, the fire suppression system’s very nature and manner of function revealed that it was an integrated component of the excavator AMAX purchased. It was, therefore, “wholly outside and apart from” the excavator itself.<sup>146</sup> Thus, according to the *Hitachi* court, the excavator and the fire suppression system “constitute one bargained for product, the damage to which is not recoverable under [the IPLA].”<sup>147</sup>

### III. DEFENSES AND COMPARATIVE FAULT ISSUES

The IPLA includes specifically enumerated defenses to product liability actions in Indiana.<sup>148</sup> Practitioners know those defenses as the incurred risk defense,<sup>149</sup> the misuse defense,<sup>150</sup> and the modification or alteration defense.<sup>151</sup> A few of the cases decided during the survey period help to illustrate how Indiana courts are applying some of those defenses.

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142. *Id.* at 463-64 (quoting *Interstate Cold Storage, Inc.*, 720 N.E.2d at 730).

143. According to the *Hitachi* court, *I/N Tek* “squarely addressed whether ‘sudden and major’ damage to a product itself is sufficient to recover under the [IPLA].” *Id.* at 464.

144. 520 U.S. 875 (1997).

145. *Hitachi Constr. Mach. Co.*, 737 N.E.2d at 464. In doing so, the *Hitachi* court analogized the fire suppression system to the vessel and hydraulic system received by the owner in the *Saratoga Fishing* case. *See id.*

146. *Id.* at 464.

147. *Id.* at 465. After making it clear that the IPLA and the Uniform Commercial Code provide separate, alternative remedies, the *Hitachi* court determined that AMAX’s failure to state a valid claim under the IPLA did not necessarily preclude it from recovery under an implied warranty theory. *See id.* at 465-66. Because, however, one of the trial court’s pretrial orders precluded warranty issues “from being fully litigated at trial,” the court remanded the breach of warranty count to the trial court for further proceedings. *See id.* at 465.

148. *See* IND. CODE § 34-20-6-1 (1998).

149. “It is a defense to an action under [the IPLA] that the user or consumer bringing the action: (1) knew of the defect; (2) was aware of the danger in the product; and (3) nevertheless proceeded to make use of the product and was injured.” *Id.* § 34-20-6-3.

150. “It is a defense to an action under [the IPLA] that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party.” *Id.* § 34-20-6-4.

151. “It is a defense to an action under [the IPLA] that a cause of the physical harm is a modification or alteration of the product made by any person after the product’s delivery to the initial user or consumer if the modification or alteration is the proximate cause of physical harm where the modification or alteration is not reasonably expectable to the seller.” *Id.* § 34-20-6-5.



In *Smock Materials Handling Co. v. Kerr*,<sup>152</sup> the Indiana Court of Appeals affirmed a jury verdict in favor of the plaintiff against a scissors lift manufacturer in the amount of \$775,000.<sup>153</sup> Challenging the trial court's denial of its motions for judgment on the evidence,<sup>154</sup> the manufacturer raised the following issues: (1) whether a change in the lift design rendered it defective; (2) whether the plaintiff incurred the risk of harm in using the lift; (3) whether the trial court erred in denying the manufacturer's proposed jury instruction on the sophisticated user doctrine; and (4) whether the trial court improperly used the term "strict liability" in its jury instructions.<sup>155</sup>

Turning first to the issue of incurred risk, Judge Baker, writing the opinion in which Judge Garrard and Judge Sullivan joined, noted that the defense of incurred risk operates under both strict liability and negligence theories.<sup>156</sup> "Incurred risk involves a mental state of venturousness on the part of the actor and demands a subjective analysis into the actor's actual knowledge and voluntary acceptance of the risk."<sup>157</sup> The *Smock* court noted that incurred risk will bar a strict liability claim where the plaintiff had actual knowledge of the specific risk and understood and appreciated the risk, but in a negligence action, incurred risk will eliminate a plaintiff's recovery if the plaintiff's contributory fault is greater than fifty percent.<sup>158</sup>

The *Smock* court found no basis for the incurred risk defense. The court pointed out that the plaintiff was unaware of the fact that the manufacturer had changed the design of the lift by eliminating pins that would have prevented rods from falling unexpectedly from the lift cups underneath the lift platform. The court also recognized that the plaintiff followed the manufacturer's safety instructions prior to positioning himself under the lift to inspect it.<sup>159</sup>

The court then turned to the manufacturer's argument that the trial court erred in refusing to deliver to the jury the sophisticated user instruction.<sup>160</sup> The sophisticated user exception to the duty to warn in product liability applies when

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152. 719 N.E.2d 396 (Ind. Ct. App. 1999).

153. See *id.* at 399.

154. See IND. TRIAL RULE 50(A).

155. See *Smock*, 719 N.E.2d at 399-400.

156. See *id.* at 402; see also IND. CODE § 34-20-6-3 (2000).

157. *Smock*, 719 N.E.2d at 402 (citing *Schooley v. Ingersoll Rand, Inc.*, 631 N.E.2d 932, 940 (Ind. Ct. App. 1994)).

158. See *id.*

159. See *id.* The evidence showed that the design was changed to eliminate the pins because the manufacturer had problems with the pins shearing off. See *id.* at 400.

160. See *id.* at 403. The manufacturer identified its proposed jury instruction as the "learned intermediary" defense. *Id.* at 404. As Judge Baker noted, the learned intermediary exception to a defective warning claim has been limited to cases involving prescription drugs and medical devices, and it is related to other defenses variously known as the sophisticated user or sophisticated intermediary defenses. See *id.* at 403 n.4. Following Judge Baker's lead, the authors also refer to the defense as the sophisticated user defense. See *id.*



the dangers posed by the product are already known to the user.<sup>161</sup> A manufacturer's reliance upon an intermediary's or a user's knowledge of danger is only reasonable "if the intermediary or the user knows or should know of the product's dangers."<sup>162</sup> The reasonableness of the manufacturer's reliance upon the intermediary's or user's sophistication depends upon the "product's nature, complexity and associated dangers, the likelihood that the intermediary [or user] will communicate warnings to the ultimate consumer, the dangers posed to the ultimate consumer by an inadequate or non-existent warning, and the feasibility of requiring the manufacturer to directly warn the product's ultimate consumers."<sup>163</sup>

The sophisticated user defense does not provide solace to a manufacturer of a product with a latent design or manufacturing defect because it is essential that intermediaries or users know or be in a position where they should know of the risk of danger.<sup>164</sup> A manufacturer cannot delegate or otherwise avoid the duty to warn of a latent defect that becomes dangerous when a product malfunctioned or was operated in an unexpected manner.<sup>165</sup>

The manufacturer also argued that the trial court erred in refusing the proposed instruction on the defense of alteration or modification.<sup>166</sup> The defense is only applicable in a product liability case if the modification or alteration is the proximate cause of physical harm and the seller would not reasonably expect the modification or alteration.<sup>167</sup> Moreover, the modification or alteration of the product must be independent of the expected and intended use of the product.<sup>168</sup>

Based on the facts of the *Smock* case, the court of appeals concluded that there was no error in denying the requested alteration or modification jury instruction. The manufacturer alleged the lift was altered or modified by the plaintiff relocating a sensor on the machine. However, the manufacturer's manual for the lift provided for adjustment of the sensor. The modification or alteration therefore was foreseeable to the manufacturer and provided no basis for the defense.<sup>169</sup>

Finally, the manufacturer argued that the trial court erred in using the term strict liability in its instructions to the jury.<sup>170</sup> The court of appeals determined that the trial court's use of the term was acceptable because the term is appropriate under Indiana law.<sup>171</sup> Although the court's finding on the use of the

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161. See *id.* at 403.

162. *Id.*

163. *Id.*

164. See *id.*

165. See *id.* (citing *Hoffman v. E.W. Bliss Co.*, 448 N.E.2d 277, 286 (Ind. 1983)).

166. See IND. CODE § 34-20-6-5 (2000).

167. See *id.*

168. See *id.*

169. See *Smock*, 719 N.E.2d at 404.

170. See *id.* at 404-05.

171. See *id.* (citing IND. CODE § 34-20-2-3 (2000) ("[a] product liability action based on the doctrine of strict liability in tort may not be commenced [against a seller of a product unless the



term strict liability is relegated to a brief section at the end of the opinion, its import may be more significant upon careful contemplation given the context of the *Smock* decision and the recent revision of the IPLA. Under the IPLA, strict liability remains a viable theory for recovery only in claims for manufacturing defects.<sup>172</sup> Strict liability is no longer available to plaintiffs seeking recovery for defective design or warning claims. Thus, the term "strict liability" is only appropriate under Indiana law in manufacturing defect claims brought against the manufacturer of the product or a domestic principal distributor of a foreign manufacturer.<sup>173</sup>

In November 2000, the court of appeals in *Rogers v. Cosco, Inc.*,<sup>174</sup> tackled three issues that are important to Indiana product liability practitioners: federal preemption; Indiana's state-of-the-art and governmental compliance rebuttable presumption; and the quantum of evidence necessary to establish the existence of a safer alternative product. This case involved Shelette Rogers' infant daughter who was injured in a traffic accident. Rogers' daughter suffered two cervical fractures that led to partial paralysis. At the time of the accident, Rogers' daughter was restrained in a child booster seat manufactured by defendant Cosco. The restraint seat did not extend to provide a separate support for a child's back or head; rather, it utilized the vehicle's own upright seat cushion for such a function. The restraint seat also employed a forward barrier, called a shield, to restrain forward motion of a child's upper torso in the event of a collision.<sup>175</sup>

Rogers' complaint alleged that Cosco violated its duty of reasonable care when it designed, manufactured, distributed, and sold the booster seat for use by children who weigh less than forty pounds. Rogers also contended that Cosco violated its duty by not warning purchasers that there was no testing to substantiate Cosco's claim that the seat could be used safely by children who weigh between thirty and sixty pounds.<sup>176</sup>

Cosco filed a motion for summary judgment on three grounds: (1) the Federal National Traffic and Motor Vehicle Safety Act ("Safety Act") preempted Rogers' state law claims; (2) Rogers failed to set forth sufficient evidence to overcome the rebuttable presumption in Indiana Code section 34-20-5-1; and (3) no safer alternative design existed, which must result in a finding that the seat's design was not deficient.<sup>177</sup> The trial court granted summary judgment to Cosco,

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seller is a manufacturer of the product]"); *Marshall v. Clark Equip. Co.*, 680 N.E.2d 1102, 1104 (Ind. Ct. App. 1997)).

172. See IND. CODE § 34-20-2-3 (1998).

173. See IND. CODE § 34-20-2-4 (2000) (stating "[i]f a court is unable to hold jurisdiction over a particular manufacturer of a product or part of a product alleged to be defective, then that manufacturer's principal distributor or seller over whom a court may hold jurisdiction shall be considered, for the purposes of this chapter, the manufacturer of the product").

174. 737 N.E.2d 1158 (Ind. Ct. App. 2000).

175. See *id.* at 1162.

176. See *id.*

177. See *id.* at 1162-63.



and Rogers appealed.<sup>178</sup> The first of the three issues on appeal was federal preemption. The court's handling of that issue is discussed later.<sup>179</sup> The latter two issues are addressed here.

After determining that the Safety Act does not preempt Rogers' claims, the court focused on whether Rogers' designated admissible evidence was sufficient to rebut the IPLA's statutory state-of-the-art and governmental compliance presumption, which provides as follows:

In a product liability action, there is a rebuttable presumption that the product that caused the physical harm was not defective and that the manufacturer or seller of the product was not negligent if, before the sale by the manufacturer, the product:

(1) was in conformity with the generally recognized state of the art applicable to the safety of the product at the time the product was designed, manufactured, packaged, and labeled; or

(2) complied with applicable codes, standards, regulations, or specifications established, adopted, promulgated, or approved by the United States or Indiana.<sup>180</sup>

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178. See *id.* at 1163.

179. See *infra* notes 389-459 and accompanying text.

180. IND. CODE § 34-20-5-1 (2000). The Indiana General Assembly enacted the rebuttable presumption as section 5 of Public Law 278-1995, which initially was codified as Indiana Code section 33-1-1.5-4.5 and later recodified as Indiana Code section 34-20-5-1. Before the 1995 amendments to the IPLA, practitioners and courts alike treated a product's conformity with the state-of-the-art as a defense to the action and a product's compliance with applicable standards as a factor to consider when determining whether a defendant's product was defective and unreasonably dangerous and whether a defendant was negligent. However, with the enactment of the 1995 amendments, a manufacturer or seller is now entitled to a rebuttable presumption that the product at issue is not defective and that the manufacturer is not negligent if, before the manufacturer's sale of the product, the product conformed to the generally recognized state-of-the-art and/or with applicable standards. See *id.*

Historically, a defense based upon conformity with the state-of-the-art required proof of more than just compliance with industry custom and practice. See *Montgomery Ward & Co. v. Gregg*, 555 N.E.2d 1145, 1155-56 (Ind. Ct. App. 1990). Before the 1995 amendments to the IPLA, a panel of the court of appeals approved of a jury instruction defining state-of-the-art as follows: "The state of the art with respect to a particular product refers to the generally recognized technological environment at the time of its manufacture. This technological environment includes the scientific knowledge, economic feasibility and the practicalities of implementation when the product was manufactured." *Weller v. Mack Trucks, Inc.*, 570 N.E.2d 1341, 1342 (Ind. Ct. App. 1991).

A defense theory based upon conformity with industry standards may now carry more weight than it once did, so long as the standards have been adopted or approved by state or federal government. In addition, defense practitioners may continue to defend cases by properly asserting that industry standards and/or custom and practice, even if not formally adopted or approved at the



According to the *Rogers* court, a showing that the seat met the requirements of the Safety Act "made it incumbent upon Rogers to designate admissible evidence to rebut the statutory presumption."<sup>181</sup> Rogers designated certain portions of depositions and articles in support of her claim that there was a genuine issue of material fact as to whether Cosco met either the requirements of the Safety Act or the state-of-the-art. According to Rogers, Cosco "'failed to perform failure mode and effect safety engineering analysis of its child safety seat, which would have been reasonably necessary to make [the] recommendation' [required by the Safety Act] as to the maximum mass and height of children 'who can safely occupy the system.'"<sup>182</sup>

However, the trial court did not specifically address whether Rogers had designated evidence sufficient to rebut the presumption that federal compliance proves that the seat is not defective and that Cosco is not negligent because it granted summary judgment on the basis of federal preemption. By the same token, the trial court did not specifically address whether there was sufficient designated evidence to establish that the seat conformed to the generally recognized state-of-the-art or whether Rogers had designated evidence sufficient to rebut the presumption that a state-of-the-art product is not defective and that Cosco is not negligent in producing and selling a state-of-the-art product. Thus, because the "crucial question of whether Rogers met her burden rests upon the issue of whether her designated evidence met the designation requirements of Indiana Trial Rule 56," the court remanded with instructions that the trial court rule upon Cosco's objection to the admissibility of Rogers' designated evidence.<sup>183</sup>

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time of manufacture, truly embodied the appropriate and applicable state-of-the-art. Furthermore, an Indiana product liability plaintiff, before 1995, could effectively counter a state-of-the-art defense by proving that the state-of-the-art of a product, as defined by a defendant, was not the actual state-of-the-art. Now, in light of the IPLA's adoption of negligence principles in design and warning cases, defendants may be entitled to argue that Indiana law requires plaintiffs to show that the manufacturer's perceived definition of state-of-the-art is incorrect and that the manufacturer's reliance on its perceived state-of-the-art and failure to design and sell a product that exceeded any applicable standards at the time of manufacture was unreasonable.

181. *Rogers*, 737 N.E.2d at 1166-67.

182. *Id.* at 1166.

183. *Id.* at 1167. The court of appeals in *Indianapolis Athletic Club, Inc. v. Alco Standard Corp.*, 709 N.E.2d 1070 (Ind. Ct. App. 1999), addressed a state-of-the-art jury instruction. There, the plaintiff argued that giving a state-of-the-art instruction is inconsistent with a claim that a manufacturing defect caused physical harm, which is a strict liability claim. The *IAC* court concluded that the state-of-the-art defense applied to plaintiff's manufacturing defect claim, and was not restricted to design defect theories. *See id.* at 1074-75.

As stated in last year's product liability survey Article:

Although the IPLA now provides that "state of the art" is no longer a "defense" in product liability cases, the *Indianapolis Athletic Club* opinion should nevertheless be helpful for practitioners who are searching for some explanation about what "state of



With respect to the "safer alternative" issue, Cosco argued that Rogers' crashworthiness claim hinged on the existence of known neck loading tolerances for young children. Cosco also argued that proof of the existence of a safer alternative (a five-point convertible seat with tether that would have limited accident-related neck loading forces) also hinges on the existence of data pertaining to tolerances. According to Cosco, it is impossible to show the existence of a safer alternative because at the time the seat was manufactured there was no meaningful data showing the neck loading tolerances of small children.<sup>184</sup>

The evidence Cosco designated, which included portions of depositions of Rogers' experts, revealed to the court that there was "no scientific basis upon which to determine the existence of a safer alternative child restraint."<sup>185</sup> According to the court, such evidence,

coupled with designated evidence that [Cosco's seat] was of a sufficient design to meet the federal requirements which allowed it to be sold for use by children under forty pounds, is prima facie evidence that there is no genuine issue of material fact as to whether a safer alternative child restraint system is in existence.<sup>186</sup>

Accordingly, the court concluded that the summary judgment burden passed to Rogers to establish that a genuine issue of material fact exists.<sup>187</sup>

Following a discussion of Rule 702 of the Indiana Rules of Evidence and the court's evidentiary gatekeeper function with respect to expert witnesses, the *Rogers* court recognized that it could not make a definitive determination on appeal because the trial court did not rule on Cosco's motion to strike the portions of the expert depositions discussed above:

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the art" means. After all, the court found that the instruction at issue correctly stated the law. Practitioners also may read *Indianapolis Athletic Club* as confirmation that the "state of the art" presumption should apply in product liability regardless whether the underlying theories sound in strict liability (manufacturing defects) or negligence (design and warning defects).

Joseph R. Alberts, *Survey of Recent Developments in Indiana Product Liability Law*, 33 IND. L. REV. 1331, 1348 (2000) (footnotes omitted).

184. See *Rogers*, 737 N.E.2d at 1167.

185. *Id.*

186. *Id.*

187. See *id.* The court did, however, initially recognize that if the case had been pending in federal court, Cosco would be entitled to summary judgment upon showing that Rogers failed to make a showing of an essential element of her crashworthiness claim. Rogers' failure "to designate admissible evidence to establish the presence of a safer alternative" to the seat manufactured by Cosco would entitle Cosco to summary judgment. *Id.* In Indiana, however, because of the different summary judgment standard for state court cases established by *Jarboe v. Landmark Community Newspapers*, 644 N.E.2d 118, 123 (Ind. 1994), "Rogers is not required to establish the presence of a safer alternative until Cosco shows the absence of any genuine issue of material fact as to that presence." *Rogers*, 737 N.E.2d at 1167.



The question of whether the disputed portions of [the purported experts'] statements are admissible has a direct bearing on whether the presumptions set forth in Ind. Code § 34-20-5-1 have been rebutted and whether there is a genuine issue of material fact on the "safer alternative" element of Rogers's crashworthiness claim. The trial court's failure to rule on the admissibility of the evidence requires us to remand to the trial court for such proceedings as may be necessary to determine whether the statements of [the purported experts] meet the requirements of Evid.R. 702.<sup>188</sup>

The remaining survey period case important to practitioners is *Chapman v. Maytag*.<sup>189</sup> Although *Chapman* is a federal decision that Magistrate Judge Foster circulated for electronic publication only, it is one about which practitioners should be aware because it contains a wealth of material for discussion in the context of product liability defenses. In this case, Kyle Chapman was electrocuted when he came into contact with ductwork in the crawl space of a home in which family members were sustaining minor electrical shocks. The special representative of Chapman's estate sued Maytag, the manufacturer of a stove that allegedly contained a defective wire. According to the plaintiff, the stove contained a wire that had become pinched between a metal housing cover and the metal back of the stove during the assembly process.<sup>190</sup>

During the course of pretrial proceedings, the court ruled upon a motion for summary judgment, and, in doing so, made the following assumption for purposes of resolving the motion:

[A] manufacturer may defend on the basis of an adequate warning even if an injury results from a defect or dangerous condition which was unanticipated and against which the warning was not intended to protect but against which compliance with the warning would have protected. Therefore, if Maytag's warnings were adequate, it may assert those warnings as a defense even against manufacturing defects.<sup>191</sup>

As the case neared trial, the court revisited its earlier assumption in the context of the parties' proposed final jury instructions and other trial filings.<sup>192</sup> The electronically published opinion is the court's second pretrial order, which addresses that and other related issues.

The court began its discussion of relevant issues by reciting some common ground. In its summary judgment order, the court determined that Maytag had

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188. *Id.* at 1169.

189. No. IP999-39-C-FID, 2000 U.S. Dist. LEXIS 10502, at \*1 (S.D. Ind. July 27, 2000).

190. *See id.* at \*2. The parties did not dispute that the stove was the source of the fatal current. *See id.* at \*2-\*3.

191. *Id.* at \*1.

192. *See id.* The court "made the assumption at the time [of its summary judgment ruling] because neither party had raised or briefed the question directly as an issue in this case and the assumption allowed the summary judgment rulings to be made." *Id.*



a duty to warn Chapman of the risk of shock from ungrounded installations and to instruct him to use a grounded receptacle.<sup>193</sup> Although Maytag supplied warnings and instructions with the stove regarding the need to use a grounded receptacle, Chapman did not do so. Beyond that matter, however, the parties' "descriptions of the posture of, and the burdens in, th[e] case diverge[d]."<sup>194</sup>

Chapman's representative argued that because she was asserting only a manufacturing defect theory and not a failure to warn theory, evidence regarding the adequacy of Maytag's warning should relate only to the assessment of comparative fault under Indiana Code section 34-20-8-1. Maytag countered that if the jury found its warnings and instructions adequately warned and instructed Chapman to use a grounded plug, then, as a matter of law, the stove was not in a defective condition unreasonably dangerous to Chapman, and Maytag could not be held liable.<sup>195</sup> In other words, Maytag contended that its adequate warnings rendered the stove non-defective or not unreasonably dangerous and Chapman's failure to heed those warnings constituted misuse, which, under Indiana Code section 34-20-6-4 is a complete defense.<sup>196</sup>

The *Chapman* court first concluded that the defense of misuse provided in Indiana Code section 34-20-6-4 is not a complete defense. Rather, according to Magistrate Foster, it shall be compared with all other fault in the case. In doing so, the court first cited Indiana Code section 34-20-8-1, which reads:

(a) In a product liability action, the fault of the person suffering the physical harm, as well as the fault of all others who caused or contributed to cause the harm, shall be compared by the trier of fact in accordance with IC 34-51-2-7, IC 34-51-2-8, or IC 34-51-2-9 [sections of the comparative fault act].

(b) In assessing percentage of fault, the jury shall consider the fault of all persons who contributed to the physical harm, regardless of whether the person was or could have been named as a party, as long as the nonparty was alleged to have caused or contributed to cause the physical harm.<sup>197</sup>

The court also recognized that, for purposes of the IPLA, the legislature defined "fault" to mean:

an act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term includes

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193. See *id.* at \*3-\*4. The court so determined because it found that "there is a significant potential for short circuits not caused by manufacturing or design defects to energize Maytag's stoves, thereby becoming unreasonably dangerous to its expected users or consumers when used in reasonably expectable ways of handling." *Id.*

194. *Id.* at \*4.

195. See *id.* According to the court, Maytag's position was "more difficult to discern and at times seem[ed] inconsistent." *Id.* at \*5.

196. See *id.* at \*5 n.2.

197. IND. CODE § 34-20-8-1 (Supp. 1999).



the following:

- (1) Unreasonable failure to avoid an injury or to mitigate damages.
- (2) A finding under IC 34-20-2 . . . that a person is subject to liability for physical harm caused by a product, notwithstanding the lack of negligence or willful, wanton, or reckless conduct by the manufacturer or seller.<sup>198</sup>

By specifically directing that the jury compare all fault in a case, Magistrate Foster concluded that the General Assembly intended that the defense, or fault, of misuse be compared as well.

It might be argued that, because the definition of "misuse" considers only the objective reasonableness of the foreseeability of the misuse and not the character of the misuser's conduct, misuse is not "fault." However, the legislature did not indicate that it intended to exempt misuse from the scope of the comparative fault requirement and a plaintiff's (mis)use does fall within the statute's definition of fault as an "act . . . that is . . . intentional toward the . . . property of others," regardless of the reasonableness of the act.<sup>199</sup>

Magistrate Foster also concluded that the cases on which Maytag relied for its contention that misuse is a complete defense "each involve incidents that occurred before comparative fault was added to the product liability statute and thus were decided under contributory negligence principles."<sup>200</sup>

After finding that the defense of misuse is not a complete one, the *Chapman* court next "conclude[d] that Maytag's warnings did not prevent its stove from being defective and Mr. Chapman's failure to comply with those warnings (if adequate) did not constitute misuse."<sup>201</sup> On that point, Magistrate Foster wrote:

Although we have found no Indiana cases on point, we conclude that adequate warnings will not render a product with a manufacturing defect non-defective, even if a duty to warn exists because of inherent dangers in a product and compliance with the warnings would have prevented the alleged injury. Our review of Indiana law persuades us that warnings are required and will save a product from being deemed "defective" only when a product is without manufacturing or design defects but nonetheless presents residual or inherent hazards that render it unreasonably dangerous. We believe that an Indiana court would follow a policy that emphasizes deterring and compensating injuries resulting from manufacturing defects (the last vestige of strict product liability in

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198. *Chapman*, 2000 U.S. Dist. LEXIS at \*6-\*7 (citing IND. CODE § 34-6-2-45(a) (1998)).

199. *Id.* at \*7-\*8 (internal citation omitted).

200. *Id.* at \*8 -\*9.

201. *Id.* at \*9. In doing so, the court recognized the three ways a product could be determined to be in a defective condition in Indiana: (1) manufacturing defect; (2) design defect; or (3) warning defect (the manufacturer could have failed to warn or could have inadequately warned of the product's dangers). *See id.* at \*9-\*10.



the state) over providing a warnings defense to manufacturers.

. . . Maytag concedes that the pinched wire was a manufacturing defect in the product. Therefore, although Maytag had a duty to provide grounding warnings because of the risk of defect-free short-circuits and compliance with adequate grounding warnings might have prevented Mr. Chapman's death, adequate warnings will not render Maytag's stove non-defective or not unreasonably dangerous under I.C. §§ 34-20-2-1, 34-20-4-1, or 34-20-4-3.<sup>202</sup>

Finally, the court concluded that Chapman's failure to heed Maytag's warnings, even if assumed to be adequate, would not constitute misuse pursuant to Indiana Code section 34-20-6-4. The *Chapman* court believed that an Indiana court would interpret the statute and make the policy decision to not allow Maytag to assert the defense of misuse on the basis of Chapman's failure to comply with its warnings.<sup>203</sup>

If the plaintiff establishes that the stove with this pinched wire was in a condition not contemplated by reasonable persons among those considered expected users or consumers of the stove and that was unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption, then Maytag will be strictly liable for the stove's defective condition and the plaintiff need not prove Maytag's negligence.<sup>204</sup>

Thus, Magistrate Foster concluded that

Maytag may not assert, prove, or argue that its warnings or Mr. Chapman's failure to comply therewith rendered the stove non-defective or constituted misuse. It may assert, prove, or argue, however, that his failure to heed its warnings constitutes fault that the jury must compare and apportion along with Maytag's own.<sup>205</sup>

The *Chapman* case raises interesting points for debate in connection with the misuse defense and its application. Indeed, the IPLA tort reform amendments of 1995 present some potentially confusing issues involving the allocation of fault among responsible parties in a product liability action. Indiana Pattern Jury Instruction 7.04(B), for example, sets forth the statutory defenses available in Indiana in product liability cases. The official comment to Instruction 7.04(B) states that it may be less confusing to substitute Instruction No. 5.61 (incurred risk) to avoid separate defense instructions in trials that involve strict liability and other negligence issues. The official comment also recognizes parenthetically that a comparative fault analysis applies to claims based upon Indiana Code section 34-20-2. These comments could lead to some confusion and certainly

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202. *Id.* at \*10-\*12 (internal citations omitted).

203. *See id.* at \*12.

204. *Id.* at \*14.

205. *Id.*



have fueled discussion. Indeed, in the years since 1995, some practitioners have been heard to make the blanket assertion that all comparative fault principles now apply "lock, stock, and barrel" to product liability cases. Several sources suggest that this is not, nor should it be, the case.

As the *Chapman* court recognized, there is an issue about whether the IPLA's enumerated defenses remain complete defenses in Indiana after 1995. Misuse, alteration/modification, incurred risk, and conformance with state-of-the-art were complete defenses to IPLA claims before the 1995 amendments because they served to relieve a defendant of liability, if the defendant were able to plead and prove any one of them.<sup>206</sup> In light of the introduction of fault allocation principles into product liability cases in Indiana in 1995, some creative and persuasive counsel have argued that misuse, alteration/modification, and incurred risk are simply arguments that affect the level or percentage of fault to be placed upon a particular claimant under the allocation. Indeed, that was the argument in *Chapman*.

Although its discussion focused upon the misuse defense, the *Chapman* court certainly was careful to point out that incurred risk likely remains a complete defense. In that connection, there are some considerations about which courts and practitioners might want to be sensitive when addressing whether incurred risk is a complete defense in future cases. First, it is important to understand that the General Assembly amended Indiana Code section 34-20-6-3, the incurred risk defense, to eliminate the word "unreasonably" from the phrase that previously read "nevertheless proceeded 'unreasonably' to make use of the product."<sup>207</sup> The language used is significant because it lends support for the proposition that incurred risk is not subject to fault apportionment.<sup>208</sup>

In addition, the definition of fault for purposes of Indiana's Comparative Fault Act,<sup>209</sup> includes incurred risk, whereas the definition of fault for purposes of the IPLA does not.<sup>210</sup> It is the Comparative Fault Act's specific incorporation of incurred risk within its definition of fault that enables a trier of fact to allocate fault to a plaintiff for incurring the risk. In stark contrast, the IPLA does not include incurred risk within the definition of fault quoted by the *Chapman* court, Indiana Code section 34-6-2-45(a). While it is clear that the General Assembly

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206. See, e.g., *Estrada v. Schmutz Mfg. Co.*, 734 F.2d 1218 (7th Cir. 1984) (finding nonforeseeable misuse is a complete defense to product liability claim); *Foley v. Case Corp.*, 884 F. Supp. 313 (S.D. Ind. 1994) (holding modification or alteration is a complete defense to certain product liability actions); *Perdue Farms, Inc. v. Pryor*, 646 N.E.2d 715 (Ind. Ct. App. 1995) (holding incurred risk is a complete defense to strict product liability claims).

207. IND. CODE § 34-20-6-3(3) (1998).

208. See Timothy C. Caress, *Recent Developments in the Indiana Law of Products Liability*, 29 IND. L. REV. 979, 1000 (1996).

209. IND. CODE § 34-51-2.

210. See *id.* § 34-6-2-45. In addition to "incurred risk," "fault" for purposes of the Comparative Fault Act includes "unreasonable assumption of risk not constituting an enforceable express consent" and "unreasonable failure to avoid an injury or to mitigate damages." *Id.* § 34-6-2-45(b).



was aware of the Comparative Fault Act's definition of fault, it appears to have borrowed selectively from that definition. The references to assumption of risk and incurred risk that are contained in the Comparative Fault Act definition of fault are conspicuously absent from the IPLA fault definition.

On this point, at least one Indiana appellate decision may provide support for the proposition that incurred risk remains a complete defense in Indiana. In *Hopper v. Carey*,<sup>211</sup> the court of appeals recognized that IPLA claims are subject to specifically enumerated defenses, including the incurred risk defense embodied in Indiana Code section 34-20-6-3. The *Hopper* court pointed out that "even if a product is sold in a defective condition [is] unreasonably dangerous, recovery will be denied an injured plaintiff who had actual knowledge and appreciation of the specific danger and voluntarily accepted [incurred] the risk."<sup>212</sup> The court makes no mention of comparing fault if there is a determination that the plaintiff had actual knowledge and appreciated the specific danger involved.

Beyond the incurred risk context, it does not seem insignificant that the General Assembly chose to eliminate the language limiting application of the traditionally complete defenses only to actions involving "strict liability in tort." Now, the defenses apply to all actions brought under the IPLA, and, therefore, all defective product cases in this state accruing after June 30, 1995. In addition, and as Magistrate Foster adeptly recognized in *Chapman*, the definition of misuse considers only the objective reasonableness of the foreseeability of the misuse and not the character of the misuser's conduct. Accordingly, there is a credible argument that misuse is not fault. That the General Assembly did not overtly indicate that it intended to exempt misuse from the scope of the comparative fault requirement does not necessarily mean that it is exempted. After all, it would seem more likely that the legislature's silence on the matter would indicate at least an implicit recognition that the complete nature of the pre-1995 product liability defenses was to remain that way notwithstanding the introduction of some comparative fault principles *vis-a-vis* defendants and non-parties. Thus it appears a debatable issue whether it is appropriate to utilize a traditional comparative fault instruction in a case in which the applicability of a misuse and alteration/modification defense may be an issue.

#### IV. EXPERT WITNESS EVIDENTIARY ISSUES

With its landmark decision of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>213</sup> the U.S. Supreme Court altered and clarified the approach for qualifying and admitting into evidence expert testimony under the Federal Rules of Evidence.<sup>214</sup> More recently, the Supreme Court provided further guidance on the

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211. 716 N.E.2d 566 (Ind. Ct. App. 1999).

212. *Id.* at 576 (quoting *Koske v. Townsend Eng'g Co.*, 551 N.E.2d 437, 441 (Ind. 1990) (emphasis added)).

213. 509 U.S. 579 (1993).

214. See FED. R. EVID. 702.



trial court's task in considering whether proffered expert testimony should be brought before the jury in *Kumho Tire Co. v. Carmichael*.<sup>215</sup> During the survey period, both the Seventh Circuit and the U.S. District Courts for the Northern and Southern Districts of Indiana revisited these issues.

In the case of *Minisan v. Danek Medical, Inc.*,<sup>216</sup> the plaintiff brought a medical device product liability action against the manufacturer of a spinal fixation device.<sup>217</sup> The plaintiff was a patient who underwent spinal fusion surgery to alleviate pain in her back. As part of the spine fusion surgery, a device was implanted on her spine and affixed to the pedicles of her vertebrae for the purpose of immobilizing that area of her back to promote the bone grafts that would complete the spine fusion. The device was affixed to her spine by screws. When her pain recurred, it was discovered that the screws had broken, and a second surgery was done with a device again being affixed to her spine with screws. However, the screws anchoring the second implant also broke.<sup>218</sup> The patient claimed that the manufacturer of the implant device "was negligent in designing, manufacturing, promoting and providing warnings about the device, and that the negligence proximately caused her continued pain and injury."<sup>219</sup>

The device manufacturer sought summary judgment on the plaintiff's claims, arguing that the plaintiff could not establish with expert testimony that the device or its alleged failure caused her injury.<sup>220</sup> The manufacturer also sought summary judgment on the grounds that the plaintiff could not establish that the product was defective and that the plaintiff's failure to warn claim was precluded by the learned intermediary doctrine.<sup>221</sup> The U.S. District Court focused its analysis on the qualifications of the plaintiff's expert testimony.<sup>222</sup>

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215. 526 U.S. 137 (1999).

216. 79 F. Supp. 2d 970 (N.D. Ind. 1999).

217. *See id.* at 971. This case had been transferred pursuant to 28 U.S.C. § 1407 by the Judicial Panel on Multi-district Litigation to the U.S. District Court for the Eastern District of Pennsylvania, for consolidated proceedings as one of more than two thousand products liability actions filed by plaintiffs claiming injuries from defective "pedicle screw fixation devices" that were surgically attached to the pedicles of the spines during spine fusion surgery. *Id.* The case was remanded to the Northern District of Indiana after the pre-trial proceedings were sufficiently completed, primarily with only case and fact specific issues remaining. *See id.*

218. *See id.* at 973-74.

219. *Id.* at 974.

220. *See id.*

221. *See id.*

222. The plaintiff did not file a brief in response to the manufacturer's motion for summary judgment. *See id.* at 971. The district court discussed and rejected the plaintiff's position with regard to her claim that the product was defective and that the manufacturer failed to warn the plaintiff in a relatively perfunctory fashion. Noting prior decisions in similar cases holding that the mere fact that a screw broke shortly after implantation did not itself evidence a defect, the court found that the plaintiff's claim of defect failed because "she made no attempt to rule out any other cause for her pain and the alleged injury." *Id.* at 977. The court also noted that the mere failure of a device standing alone will not render a manufacturer liable, and that it is "a known fact in the



Particularly in medical device product liability cases, proof of legal causation must be presented by expert testimony, "and the expert's opinion must be stated in terms of reasonable probability."<sup>223</sup> The expert's degree of certainty is irrelevant if the opinion is unsupported.<sup>224</sup> The expert testimony's proponent must show by a preponderance of the evidence that the expert witness is qualified to provide the opinion.<sup>225</sup>

However, after surpassing the first qualification hurdle, the proponent of expert testimony must show that, in addition to the expert having sufficient knowledge and training, the expert's testimony is reliable.<sup>226</sup> An expert cannot offer merely conclusory opinions, should address other factors that may have caused the alleged damages, and must provide an explanation as to how or why the expert arrived at his conclusions.<sup>227</sup> The expert must provide the trial court with a sufficient explanation and understanding of how the expert developed his conclusions or opinions so that the court can evaluate the reliability of the testimony.

In this respect, the proffered expert in the *Minisan* case failed to pass muster. Although the expert physician certainly was qualified—an Osteopath with board certification in orthopedic surgery and pain management and training in spine surgery—his expert conclusions were based solely on an examination of the plaintiff's medical records. The physician never examined the plaintiff, met with her or even spoke with her. The physician never examined or tested the medical device in question. Finally, the physician failed to provide any explanation as to how he reached his conclusions. The trial judge found the expert's testimony unreliable.<sup>228</sup>

The trial court judge acts as the gatekeeper to ensure that expert testimony and evidence "is not only relevant, but reliable."<sup>229</sup> In the decision of *Owens v.*

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medical community that bone screws may break due to a number of factors unrelated to any defect." *Id.* The court also discussed the requirement that the defective product must be "unreasonably dangerous." *See id.* Noting prior case law in which the court held that use of a medical device in a manner not approved by the FDA does not mean that the device is defective, the court found no evidence of a defect in the physician's "off label" application of the implant device. *See id.* at 978. The court finally rejected the plaintiff's failure to warn claim, noting that "manufacturers of prescription medical products have a duty only to warn physicians, rather than patients, of the risks associated with the use of the product." *Id.* Furthermore, the court noted that, "even if the manufacturer failed to warn or advise the physician, the manufacturer would not be liable if the plaintiff's physician independently knew of the risks and failed to advise the plaintiff." *Id.* The plaintiff failed to produce any evidence supporting this allegation. *See id.* at 979.

223. *Id.* at 975.

224. *See id.*

225. *See id.*

226. *See id.* at 976.

227. *See id.*

228. *See id.*

229. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993).



*Amtrol, Inc.*,<sup>230</sup> Judge Miller discussed the trial court's role in assessing the reliability of expert testimony. "This inquiry focuses, not only [on] the witness's qualifications as an expert in the field, but rather on the methodology the expert used to reach the proffered opinion."<sup>231</sup> The expert must substantiate the basis of his opinion to the trial court.<sup>232</sup>

The trial court's inquiry into the reliability of an expert's testimony is "a flexible one," designed to assure that the expert employs in the courtroom the same level of "intellectual rigor" practiced in the field.<sup>233</sup> Although there is no defined standard under which the trial court is to assess the reliability of an expert's testimony, among the factors the court may consider is "(1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subject to peer review and publication; (3) whether the theory or technique has a known or potential rate of error; and (4) whether the theory or technique is generally accepted."<sup>234</sup> Speculative testimony, even offered by an expert of the highest credentials, is inadmissible.<sup>235</sup>

In the *Owens* case, the estate of a deceased pressure tank technician brought an action against the tank's manufacturer for damages incurred when a pressure tank that the deceased was repairing exploded, causing his death.<sup>236</sup> The plaintiff engaged a qualified expert to inspect the tank and offer an opinion on defective design or manufacture.<sup>237</sup> The plaintiff's expert viewed the tank after the explosion and compared it to similar tanks and to alternatively designed tanks. The expert noted that similar tanks with different weldings did not show the corrosion around the base that the manufacturer's tank did, and that other tanks manufactured by the defendant showed the same indications of rust. The expert then opined that the tank suffered of defective manufacture, resulting in the development of rust that "reduced the wall thickness [of the tank] to practically nothing," and was also defectively attached to its base cylinder.<sup>238</sup>

However, the expert provided nothing to the trial court explaining how he reached his conclusions, and the trial court agreed with the manufacturer that the

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230. 94 F. Supp. 2d 952 (N.D. Ind. 2000).

231. *Id.* at 955 (citing *Clark v. Takata Corp.*, 192 F.3d 750, 756 (7th Cir. 1999)).

232. *See id.*

233. *Id.* (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999)).

234. *Id.* (quoting *United States v. Vitek Supply Corp.*, 144 F.3d 476, 484-85 (7th Cir. 1998), *cert. denied*, 525 U.S. 1138 (1999)).

235. *See id.*

236. *See id.* at 954.

237. *See id.* The plaintiff's expert was experienced in the design of pressure vessels, held a Bachelor's degree in mechanical engineering, worked as an instructor in a university engineering department, and had extensive employment in the field of applied engineering. *See id.* at 955. The manufacturer challenged the qualifications of the plaintiff's expert, arguing that the expert had no experience with water pressure vessels. This was summarily rejected by the trial court, which noted that the manufacturer offered nothing to indicate that experience with pressure vessels is different from that with water vessels. *See id.*

238. *Id.* at 956.



expert's opinion was merely observational without analysis.<sup>239</sup> The court noted that, while reliable engineering principles may exist that would support the expert's reasoning, no such principles or other foundation providing the basis of the expert's conclusions were provided to the court.<sup>240</sup> The court "must evaluate the reliability of the bridge the expert takes to an opinion, not the opinion itself."<sup>241</sup> The court went on to assert that "[c]ertainly, when the asserted cause of the patient's condition is a phenomenon that requires specialized scientific knowledge, 'an insightful, even an inspired, hunch' will not suffice."<sup>242</sup> Since the plaintiff offered no explanation of how the expert went from his observations to his conclusions, the court rejected his testimony as unreliable.

Practitioners preparing for summary judgment or trial in matters that inherently require the assistance of expert opinion testimony must work with caution to assure not only that the expert is qualified to provide the propounded testimony and that the expert's opinion is founded upon sound principles under the guidelines of *Daubert* and *Kuhmo Tire Co.*, but also that the expert's methodology for deriving an opinion and the substantial basis for that opinion is made part of the record and brought before the trial court for consideration.

In the decision of *Smith v. Ford Motor Co.*,<sup>243</sup> the Seventh Circuit considered the exclusion of the testimony of two expert witnesses offered on the issue of whether a steering gear box in a vehicle was defectively designed or manufactured. The U.S. District Court for the Southern District of Indiana ruled on the day of trial that the plaintiff's two expert witnesses could not testify as proposed and then dismissed the action with prejudice because the plaintiff had no other expert witnesses to substantiate his claim. The court excluded the witness' testimony on the basis that the experts were not qualified to testify and that their testimony would not be helpful to the jury.<sup>244</sup>

The Seventh Circuit noted that an expert may be qualified by "knowledge, skill, experience, training or education."<sup>245</sup> Rule 702 of the Federal Rules of Evidence contemplates the admission of testimony by experts whose knowledge is based on experience, as well as those who gain their qualifications through "academic and practical expertise."<sup>246</sup> The court considers the "full range of [an expert's] practical experience as well as his or her academic or technical training when determining whether an expert is qualified to render an opinion in a given area."<sup>247</sup>

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239. See *id.* The court noted that "[h]ands-on testing and review of experimental, statistical, or other scientific data gathered by others are examples of reasonable methodologies upon which opinion may reliably rest." *Id.* at 955.

240. See *id.* at 956.

241. *Id.*

242. *Id.* (quoting *Cooper v. Carl A. Nelson & Co.*, 211 F.3d 1008, 1020 (7th Cir. 2000)).

243. 215 F.3d 713 (7th Cir. 2000).

244. See *id.* at 717.

245. *Id.* at 718 (quoting FED. R. EVID. 702).

246. *Id.* (quoting *Bryant v. City of Chicago*, 200 F.3d 1092, 1098 (7th Cir. 2000)).

247. *Id.*



The plaintiff in *Smith* alleged that the steering gear box failed due to a defect, causing him to be unable to gain control of his vehicle, resulting in a single vehicle collision from which he sustained injuries.<sup>248</sup> To support his position, the plaintiff presented two expert witnesses: a mechanical engineer, who had previously worked for General Motors performing accident reconstruction analysis, and a metallurgical engineer, who worked for General Motors for an extended period of time before leaving to form his own engineering firm.<sup>249</sup>

The mechanical engineer examined the plaintiff's vehicle twice and based upon his analysis, determined "that there was an internal failure in the steering gearbox, that the failure occurred while the vehicle was in use before it left the road," and that the failure was due to a defect in the parts inside the gearbox, although he was unable to determine whether the defect was due to the design or the manufacture of the affected parts.<sup>250</sup> The metallurgical engineer removed and opened the gearbox in the presence of the manufacturer's technician, inspected the mechanisms inside the gearbox, and "determined that the steering had failed due to the overloading of the torsion bar and that the specific parts were manufactured according to the manufacturer's specifications."<sup>251</sup> Like the mechanical engineer, however, he was unable to determine whether the defect was due to design or manufacture. He offered several hypothetical explanations for the failure and stated that, in his opinion, using a different metal for the torsion bar would have been a better choice.<sup>252</sup>

The manufacturer argued, and the district court agreed, that plaintiff's two experts were not qualified to render their proffered opinions because neither were qualified as automotive engineers.<sup>253</sup> Although the Seventh Circuit concurred that neither of plaintiff's experts were qualified as automotive engineers, it noted that plaintiff did not seek to qualify either as an expert in automotive design or manufacture.<sup>254</sup> The court explained that "expert testimony need only be relevant to evaluating a factual matter in the case. . . . [and] need not relate directly to the ultimate issue that is to be resolved by the trier of fact."<sup>255</sup> The Seventh Circuit held that the trial court "erred in concluding that [the two experts] were not qualified as experts in a relevant field solely because their expertise related to an area other than the one concerning the ultimate issue" in the case.<sup>256</sup>

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248. *See id.* at 716. The plaintiff fell asleep while driving his vehicle, causing his vehicle to cross over the grassy median and opposing travel lanes, at which time the plaintiff awakened and attempted to steer the vehicle back to the proper side of the road. The plaintiff contended that the steering mechanism then failed due to the defect and he was unable to steer the vehicle, causing his vehicle to exit the traveling surface and strike a concrete culvert. *See id.*

249. *See id.*

250. *Id.*

251. *Id.* at 716-17.

252. *See id.* at 717.

253. *See id.* at 719-20.

254. *See id.* at 720.

255. *Id.*

256. *Id.*



The appellate court then addressed the district court's finding that the testimony of the two expert witnesses was unreliable because its contents had not been "peer reviewed."<sup>257</sup> The court noted that "no single factor among the traditional *Daubert* list is conclusive in determining whether the methodology relied upon by a proposed expert is reliable."<sup>258</sup> The Seventh Circuit noted that the reliability test under Federal Rules of Evidence Rule 702 is individualized and dependent upon the type of expertise at issue in a given case.<sup>259</sup> The court went so far as to opine that the "lack of peer review will rarely, if ever, be the single dispositive factor that determines the reliability of expert testimony."<sup>260</sup>

The Seventh Circuit then turned to the district court's conclusion that the testimony of the two experts would not be helpful to the jury.<sup>261</sup> The appellate court found that the district court's reasoning requires a scope of relevancy more narrow than that contemplated under the Federal Rules of Evidence. "In order for an expert's testimony to qualify as 'relevant' under Rule 702 it must assist the jury in determining *any* fact at issue in the case."<sup>262</sup> Although Rule 704(a) of the Federal Rules of Evidence permits an expert to testify to the ultimate issue in a case, "the expert's testimony need not relate to the ultimate issue in order to be relevant."<sup>263</sup>

The Seventh Circuit made a notable observation in dicta. In a footnote, the court advised that

it would be appropriate for a district court to apply Rule 702's requirements to individual pieces of proposed testimony, so that if the district court found a particular part of that testimony irrelevant or unreliable, it could exclude that portion of the testimony without striking the proposed evidence in its entirety.<sup>264</sup>

This observation creates minimal disruption to the analysis of witness testimony under the traditional relevancy considerations, as courts and litigants have routinely sought to confine the testimony of lay and expert witnesses alike to the scope of evidence relevant to the issues at trial.

However, under the principles of *Daubert* and *Kumho Tire Co.*, testing the reliability of portions of an expert's testimony, rather than the expert's testimony as a whole, creates a sea of pitfalls and opportunities for litigants and judges alike. Upon determining that a portion of the expert's methodology is unreliable, the court will then be required to determine what portion of the expert's opinion is derived from unreliable methods. Opponents of the expert's testimony will push to include the majority of the expert's opinion within the realm of the

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257. *Id.*

258. *Id.*

259. *See id.*

260. *Id.*

261. *See id.* at 721.

262. *Id.* (emphasis in original).

263. *Id.*

264. *Id.* at 721 n.3.



unreliable methodology, whereas proponents of the testimony will seek to dissect the smallest (and perhaps most insignificant) portions of the expert's testimony derived from unreliable methods from other proper testimony.

Courts must observe the overriding principle that the trial judge, standing as gatekeeper, is only to evaluate the methodology the expert used in forming the opinion, and not the opinion itself. In assessing whether the proffered testimony exceeds the bounds of the expert's reliable methodology, the trial court will have to consider not only the methodology employed, but the results and conclusions that the expert asserts to have gained from the process. The trial judge must then assess whether the substance of the proposed conclusion could have been reasonably derived from the process without considering whether the proposed conclusion is correct or even believable.

It was this balancing of the *Daubert* principles that the U.S. District Court for the Northern District of Indiana considered in the case of *Dartey v. Ford Motor Co.*<sup>265</sup> In *Dartey*, the plaintiff claimed injuries when the tailgate of his Ford pickup truck fell after the support cables on the tailgate snapped.<sup>266</sup> The plaintiff claimed that the plastic casings surrounding the metal support cables had deteriorated over time, allowing moisture to corrode the metal cables.<sup>267</sup>

To support his position, plaintiff offered the testimony of two expert witnesses, a metallurgical engineer and a plastics expert.<sup>268</sup> The metallurgical engineer testified during the evidentiary hearing and also in deposition that "the metal wires supporting the tailgate on the [Dartey's] truck fractured due to metal fatigue brought on by the long-term opening and closing of the tailgate, further aggravated by corrosion."<sup>269</sup> He concluded that the metal used to support the tailgate was unsuitable for long-term use and the design of the tailgate, which required the metal cables to rest in a confined space over the long-term, created a scenario in which the metal wires were bound to fail.<sup>270</sup> He proposed an alternative design involving metal hinges.<sup>271</sup>

The plastics expert testified that the material covering the cables was made of a thin, flexible nylon material, which was cracked and hard along the entire expanse of the cable.<sup>272</sup> The material, in this condition, permitted moisture to corrode the metal wires.<sup>273</sup> He opined that the material "was not capable of withstanding long-term use and, therefore, the nylon would not remain intact for the life of the truck."<sup>274</sup> The expert suggested that a better material, called thermoplastic elastimer (TPE) was available at the time the truck in question was

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265. 104 F. Supp. 2d 1017 (N.D. Ind. 2000).

266. See *id.* at 1019-20.

267. See *id.* at 1026.

268. See *id.* at 1020.

269. *Id.*

270. See *id.*

271. See *id.* at 1020-21.

272. See *id.* at 1021.

273. See *id.*

274. *Id.*



produced and would have been a better alternative.<sup>275</sup>

Ford moved to exclude the testimony of the two experts, contending that the experts lacked experience designing tailgates or tailgate support components.<sup>276</sup> Chief Judge Lee, turning to the U.S. Supreme Court's decision in *Kumho Tire Co. v. Carmichael*,<sup>277</sup> and the Seventh Circuit's opinion in *Smith v. Ford Motor Co.*,<sup>278</sup> rejected Ford's argument on the basis that the experts' proffered testimony was within their realm of expertise.

The district court noted that the metallurgical engineer had sufficient credentials to establish himself as an expert metallurgist.<sup>279</sup> As to Ford's assertion that the metallurgist was not qualified as an expert in the field of design engineering, the district court determined that this factor alone did not automatically negate all of the expert's testimony.<sup>280</sup>

The district court determined that the metallurgical engineer's proposed testimony related to an area other than the one concerning the ultimate issue at trial—whether there existed a design defect in the metal cables—and encompassed materials not readily understandable by laymen on the jury, making the expert's testimony helpful to the factfinder.<sup>281</sup> The plaintiff offered the witness only as an expert in metallurgy, and the expert could confine his proposed testimony to the his field of expertise.<sup>282</sup>

The court further rejected Ford's argument that the expert's methodology was unsound under the principles of *Daubert* because the witness had not: (1) done any testing of his own theory, (2) subjected his opinions to peer review; and (3) inquired about the load that plaintiff placed on the tailgate throughout the life of the truck.<sup>283</sup> The court noted that "no single factor among the traditional *Daubert* factors [was] conclusive in determining whether the methodology relied upon by a proposed expert is reliable."<sup>284</sup> Here, the expert's testimony regarding how the cable fell was "elementary in nature" and the scientific principles underpinning his opinion were "obvious" and based on well-established scientific principles, thereby alleviating the need to test the theory further or to submit the opinion for peer review.<sup>285</sup>

The district court addressed the issue pertaining to the plastics expert in similar fashion. Ford challenged the qualifications of the plastics expert due to his inexperience and unfamiliarity with design engineering.<sup>286</sup> The court, noting

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275. *See id.*

276. *See id.*

277. 526 U.S. 137 (1999).

278. 215 F.3d 713 (7th Cir. 2000).

279. *See Dartey*, 104 F. Supp. 2d at 1023.

280. *See id.*

281. *See id.* at 1024.

282. *See id.*

283. *See id.*

284. *Id.* (citing *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999)).

285. *Id.*

286. *See id.* at 1025.



that the expert was certainly qualified in his proffered field of testimony, found that he need not be qualified as to the ultimate issue for trial in order to testify on other issues relevant to the case.<sup>287</sup> Chief Judge Lee determined that the plastics engineer could testify as to the condition of the plastic sheathing and, due to the condition, that it had permitted moisture to seep through and corrode the metal wires.<sup>288</sup>

However, with regard to both witnesses, the court specifically ordered that neither witness could testify outside his respective field of expertise.<sup>289</sup> Applying the *Daubert* standards to the various areas of proposed testimony, the court directed that the plaintiff's witnesses would be required to confine their testimony to only their respective topics.<sup>290</sup> For example, while the plastics expert was permitted to testify as to his opinion that TPE was a better choice for the metal cables casings, he would not be permitted to offer an opinion as to whether Ford's failure to use TPE made the design of the tailgate defective.<sup>291</sup>

Ford also attacked the testimony of the plastics expert on the grounds of relevancy. Ford argued that the expert (1) had not tested the TPE plastic; (2) had not designed a tailgate using TPE plastic; (3) could not confirm that any automobile manufacturer ever used TPE at the time the pickup truck was designed; and (4) did not have evidence to dispute that nylon casings were state-of-the-art at the time of the design.<sup>292</sup> Although the court noted that all these charges may be true, it held that such would be left for cross-examination and did not affect the overall admissibility of the proposed expert testimony on the grounds of relevancy.<sup>293</sup>

The Seventh Circuit Court of Appeals further discussed the admissibility of expert testimony in product liability cases in the matter of *Weir v. Crown Equipment Corp.*<sup>294</sup> In *Weir*, a forklift operator injured her foot when the lift collided with a parked forklift.<sup>295</sup> The facts indicated that the forklift on which the plaintiff was riding was equipped with a "deadman brake," which would stop the forklift upon the operator lifting her foot off the depressed brake pedal, and a "plugging" brake, which would bring the forklift to a stop upon moving the forklift's control lever to a reverse position.<sup>296</sup> The plaintiff brought an action against the forklift manufacturer, claiming her foot was injured when the

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287. *See id.*

288. *See id.*

289. *See id.* at 1025-26.

290. *See id.*

291. *See id.* at 1025.

292. *See id.* at 1026.

293. *See id.* "[T]he Seventh Circuit has recently re-emphasized *Daubert*'s admonition that, 'vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'" *Id.* (citing *Walker v. Soo Line R.R. Co.*, 208 F.3d 581, 586 (7th Cir. 2000)).

294. 217 F.3d 453 (7th Cir. 2000).

295. *See id.* at 455-56.

296. *Id.* at 454-55.



“deadman” brake and the “plugging” mechanism failed, causing her to collide with a parked forklift.<sup>297</sup> The U.S. District Court for the Southern District of Indiana entered judgment for the manufacturer.

On appeal, the plaintiff claimed that the trial court erred in excluding evidence and the testimony of her expert witness. Plaintiff first argued that the trial court erred in excluding a large portion of accident report documents that the manufacturer turned over to plaintiff during discovery.<sup>298</sup> The manufacturer turned over more than a thousand accident reports pertaining to accidents involving its forklifts.<sup>299</sup> The district court excluded all of the reports except those that pertained to forklift accidents substantially similar to one that the plaintiff claimed to have experienced.<sup>300</sup> The district court allowed into evidence reports “which involved a failure of both the plugging mechanism and the deadman brake together with pre- and post-accident testing showing both brakes to be working.”<sup>301</sup> This reduced the number of accident reports admitted to only twenty-seven.<sup>302</sup>

In affirming the district court’s ruling, the Seventh Circuit noted that “[e]vidence of other accidents in products liability cases is relevant to show notice to the defendant of the danger, to show existence of the danger, and to show the cause of the accident.”<sup>303</sup> However, before evidence of prior accidents is admitted, “the proponent must show that the . . . accidents occurred under substantially similar circumstances.”<sup>304</sup>

In determining what constitutes “substantial similarity” the Seventh Circuit turned to the decision *Nachtsheim v. Beech Aircraft Corp.*, in which the court held:

“The foundational requirement that the proponent of similar accidents evidence must establish substantial similarity before the evidence will be admitted is especially important in cases such as this where the evidence is proffered to show the existence of a dangerous condition or causation. The rationale for this rule is simple. In such cases, the jury is invited to infer from the presence of other accidents (1) that a dangerous condition existed (2) which caused the accident. As the circumstances and conditions of the other accidents become less similar to the accident under consideration, the probative force of such evidence decreases. At the same time, the danger that the evidence will be unfairly prejudicial remains. The jury might infer from evidence of the

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297. *See id.*

298. *See id.* at 457.

299. *See id.*

300. *See id.*

301. *Id.*

302. *See id.*

303. *See id.* (quoting *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1268 (7th Cir. 1988)).

304. *Id.* (quoting *Nachtsheim*, 847 F.2d at 1268).



prior accident alone that ultra-hazardous conditions existed . . . and were the cause of the later accident without those issues ever having been proved. In addition, the costs—in terms of time, distraction and, possibly, prejudice—resulting from such evidence also may weigh against admissibility.”<sup>305</sup>

Here, all of the accident reports turned over to the plaintiff did not involve incidents substantially similar to the plaintiff’s accident. The plaintiff argued “that the district court misapplied the substantial similarity test by adding additional criteria beyond mere brake failure.”<sup>306</sup> The Seventh Circuit disagreed, noting that under the plaintiff’s theory of the case, the forklift was unreasonably dangerous because of a design defect which resulted in brake failure in cases of a specific nature which therefore permitted the additional criteria.<sup>307</sup>

The court then turned to the issue of excluding the plaintiff’s expert testimony. The plaintiff argued that she should have been permitted, through her expert, to offer evidence that the manufacturer should have incorporated a door or barrier across the open side of the forklift and that such a mechanism was a cost-effective remedy that would have prevented her injury.<sup>308</sup> In ruling to exclude the testimony, the district court found the proposed evidence irrelevant and inadmissible because it showed that the plaintiff’s foot was outside of the running lines of the machine before the collision and was not forced outside the machine by the impact.<sup>309</sup>

The plaintiff’s expert offered two alternative design theories, one involving a door across the open side of the operator’s compartment and another involving a wedge-shaped barrier that the plaintiff’s expert had designed. In an offer of proof, the expert testified that the manufacturer had sold over 300 doors for its forklifts and, upon studying accident reports, none of the accidents involving forklifts with doors resulted in lower limb injury.<sup>310</sup>

In affirming the trial court’s exclusion of the expert’s testimony, the Seventh Circuit noted that, under the plaintiff’s own account of the accident, the presence of doors may not have prevented her injury.<sup>311</sup> The plaintiff testified that there was “no swerving, acceleration, bumping or rough floor to traverse” before the collision that could have forced her foot outside the operator’s compartment.<sup>312</sup>

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305. *Id.* at 457-58 (quoting *Nachtsheim*, 847 F.2d at 1268-69) (internal quotations and citations omitted)).

306. *Id.* at 458.

307. *See id.* The plaintiff contended that the design of the forklift would permit the vehicle to continue to move if the “deadman” brake pedal was slightly lifted by the operator crossing over her feet, which would disengage the “plugging” mechanism without engaging the braking mechanism. *See id.*

308. *See id.* at 459.

309. *See id.*

310. *See id.*

311. *See id.* at 460.

312. *Id.*



The plaintiff had been trained to keep her feet inside the operator's compartment when operating the forklift, and the plaintiff's expert testified that he knew of nothing that occurred to force the plaintiff's foot outside the forklift.<sup>313</sup>

The Seventh Circuit affirmed the exclusion of the expert's alternative door design theory even under the "doctrine of crashworthiness."<sup>314</sup> Under the doctrine of crashworthiness, "a manufacturer may be held liable for injuries sustained in an accident where a manufacturing or design defect, although not the cause of the accident, caused or enhanced a plaintiff's injuries."<sup>315</sup> The court held:

A product is not considered to be defective under a crashworthiness analysis merely because the product failed and caused injury. Instead, a finding of defectiveness is based on the conclusion "that the product failed to provide the consumer with reasonable protection under the circumstances surrounding a particular accident. Therefore, "a claimant should be able to demonstrate that a feasible, safer, and more practical design would have afforded better protection."<sup>316</sup>

Again, the Seventh Circuit emphasized the fact that no evidence was presented showing that the circumstances surrounding the accident caused the plaintiff's foot to leave the operator's compartment.<sup>317</sup> The court reasoned that "the operator's compartment, even without a door, provided reasonable protection under the circumstances."<sup>318</sup>

The Indiana Court of Appeals considered two cases during the survey period that undertook the state counterpart to the federal *Daubert* analysis. In the case of *Hannan v. Pest Control Services, Inc.*,<sup>319</sup> the court considered whether the testimony of any of the plaintiffs' several expert witnesses was admissible in claims for personal injuries arising from the application of a pesticide in their home. The defendant was engaged by the plaintiffs to spray their home to combat an infestation of ants. The plaintiffs claimed that shortly after their home was sprayed, they began to exhibit symptoms of the flu. The defendant moved for summary judgment, arguing that no genuine issue of material fact existed regarding the plaintiffs' claims that exposure to chemicals caused their injuries, and also moved to exclude the plaintiffs' medical causation expert witnesses. The trial court found that the plaintiffs' expert testimony on the issue of medical causation was inadmissible under Indiana Evidence Rule 702 and common law.<sup>320</sup> The trial court further determined that establishing medical causation was an essential element and that the plaintiffs' failure to submit competent and

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313. See *id.*

314. *Id.*

315. *Id.* at 460-61 (citing *Miller v. Todd*, 551 N.E.2d 1139, 1140 (Ind. 1990)).

316. *Id.* at 461 (quoting *Miller*, 551 N.E.2d at 1143).

317. See *id.*

318. *Id.*

319. 734 N.E.2d 674 (Ind. Ct. App. 2000).

320. See *id.* at 678.



admissible evidence on the issue entitled the defendant to summary judgment.<sup>321</sup>

In reviewing the exclusion of the plaintiffs' expert witnesses, the court of appeals recited Indiana's two-prong standard: "(1) the subject matter [must be] distinctly related to some scientific field, business or profession beyond the knowledge of the average lay person; and (2) the witness [must be] shown to have sufficient skill, knowledge or experience in that area so that the opinion will aid the trier of fact."<sup>322</sup> The court noted that the first prong of this test was clearly established in this case because medical causation questions "are questions of science necessarily dependent on the testimony of physicians and surgeons learned in such matters."<sup>323</sup>

Turning then to the second prong of the test, the court noted that Rule 702 of the Indiana Rules of Evidence requires that the expert "have sufficient skill in the particular area of expert testimony before the expert can offer opinions in that area."<sup>324</sup> The court found that "[a]n expert in one field of expertise cannot offer opinions in other fields absent a requisite showing of competency in that other field."<sup>325</sup>

The trial court, acting in the capacity of gatekeeper under Rule 702, "must make a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid" and whether it can be applied properly to the facts in issue.<sup>326</sup> The expert's testimony must be supported by "good grounds" based upon what is known establishing a standard of evidentiary reliability.<sup>327</sup> In determining whether a theory or technique is scientific knowledge that will assist the trier of fact, courts consider whether the theory can be empirically tested, whether the theory has been subjected to peer review or publication, and whether it enjoys widespread support.<sup>328</sup>

The plaintiffs offered the testimony of three experts to support medical causation. The first, Dr. Johnson, sought to testify that the plaintiffs' exposure to the chemicals triggered a condition known as Multiple Chemical Sensitivity.<sup>329</sup> The court of appeals noted that several jurisdictions have rejected the multiple chemical sensitivity theory, and that in order to testify on the subject, Dr.

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321. See *id.* at 677-78. The defendant contended that the expert witnesses failed to use generally accepted toxicological cause-and-effect methodology, their methods and opinions were not generally accepted in the scientific medical community, their opinions did not constitute scientific knowledge and were inherently unreliable, and the experts failed to negate other potential causes of the plaintiffs' alleged illnesses. See *id.* at 677.

322. *Id.* at 679 (quoting *Bacher v. State*, 686 N.E.2d 791, 800 (Ind. 1997)).

323. *Id.* (citing *Brown v. Terre Haute Reg'l Hosp.*, 537 N.E.2d 54, 61 (Ind. Ct. App. 1989)).

324. *Id.* (citing *Harlan Sprague Dawley v. S.E. Lab Group*, 644 N.E.2d 615, 621 (Ind. Ct. App. 1994)).

325. *Id.* (citing *Hegerfeld v. Hegerfeld*, 555 N.E.2d 853, 855-56 (Ind. Ct. App. 1990)).

326. *Id.* (citing *Hottinger v. Trugreen Corp.*, 655 N.E.2d 593, 596 (Ind. Ct. App. 1996)).

327. *Id.* (citing *Steward v. State*, 652 N.E.2d 490, 498 (Ind. 1995)).

328. See *id.* (citations omitted).

329. See *id.* at 680.



Johnson would have to be versed in a number of medical specialties.<sup>330</sup>

Dr. Johnson was an osteopathic physician.<sup>331</sup> He was not board certified in internal medicine, had never taken the allergy or immunology board examinations, and was not certified in allergy, immunology, preventive medicine, occupational medicine, public health, epidemiology, neurology, toxicology, immuno-toxicology or psychiatry.<sup>332</sup> Furthermore, the court found that Dr. Johnson's method for developing his opinion consisted of a physical examination of the patient followed by an interview.<sup>333</sup> Dr. Johnson did not perform any testing on the patient, did not examine the exposure levels or dose of the chemical received by the patient, and he had no information regarding the exposure level. Dr. Johnson never visited the plaintiffs' residence, had not examined any photographs or diagrams of the home or its ventilation system, and was unaware of the size of the home.<sup>334</sup> Dr. Johnson admitted that he had only made a "presumptive diagnosis" of chemical sensitivity. He did not preclude other possible bases for the patient's ailments, and conceded that the plaintiffs' symptoms could have been caused by other ailments.<sup>335</sup>

The plaintiffs' second expert witness, Dr. Evans, sought to testify that the plaintiffs' symptoms were caused by organophosphate exposure.<sup>336</sup> While Dr. Evans held a doctorate degree in toxicology, he did not have a medical degree and was not qualified to examine patients or define human medical diagnoses.<sup>337</sup> "Dr. Evans conceded that he [was] not qualified to testify regarding medical causation."<sup>338</sup>

Dr. Evans developed his opinion without information regarding the plaintiffs' exposure level to the chemicals, without consideration of residential or occupational exposure guidelines, and without inspecting the plaintiffs' home or having any information pertaining to its size or ventilation. Dr. Evans conceded that all of this information was relevant to the question of exposure level.<sup>339</sup>

"Dr. Evans agreed that if the chemicals had been properly applied, the plaintiff would not have suffered any medical effects from them."<sup>340</sup> Dr. Evans acknowledged that the application of the chemicals in the plaintiffs' home appeared to be within the recommended levels, and that without evidence that the chemical was misapplied, there could be no cause-and-effect basis to conclude

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330. *See id.* at 680 n.3.

331. *See id.*

332. *See id.*

333. *See id.* at 680. The diagnosis was offered for only one of the several plaintiffs claiming injuries.

334. *See id.* at 681.

335. *See id.*

336. *See id.*

337. *See id.*

338. *Id.*

339. *See id.*

340. *Id.*



that the plaintiffs were overexposed to the chemicals.<sup>341</sup>

The third expert offered by the plaintiffs was Dr. Kelly, whose proposed testimony would have been that two of the plaintiffs acquired immunologic abnormalities as a result of the chemicals. Dr. Kelly reached this conclusion after relying upon blood tests that had been taken five years after the exposure, which he did not receive until after he made his diagnosis. Dr. Kelly conceded that his diagnosis of RADS was only tentative and equivocal and that the symptoms and alleged exposure did not satisfy "the generally accepted and required criteria for diagnosing RADS."<sup>342</sup>

The court found that Dr. Kelly's diagnosis of a causal connection between the pesticide application and the plaintiffs' alleged symptoms was devoid of (1) any analysis of the exposure levels plaintiffs received, which Dr. Kelly admitted were relevant, (2) any inspection of the plaintiffs' residence or blueprints of their home, and (3) any knowledge of the duration to which the plaintiffs' were exposed to the chemicals.<sup>343</sup> Dr. Kelly conceded that he was simply making an assumption regarding the dose level received by the plaintiffs.<sup>344</sup> Dr. Kelly was also unaware that one of the plaintiffs had previous exposures to chemicals that could cause a person to experience many of the same symptoms of which the plaintiffs complained.<sup>345</sup>

Dr. Kelly had never published any literature regarding organophosphate chemicals or immunological disorders and could not point to any peer-reviewed authority to support his medical causation conclusions.<sup>346</sup> In addition, Dr. Kelly did not offer any explanation that would exclude other possible causes of the plaintiffs' alleged symptoms, but acknowledged, however, that there were numerous causes for each of the symptoms but made no effort to investigate them.<sup>347</sup>

The court summarized the proposed testimony of the plaintiffs' medical causation experts as relying on "mere temporal coincidence of the pesticide application" and the plaintiffs' alleged illnesses.<sup>348</sup> The court found such a relationship insufficient to establish the element of causation.<sup>349</sup>

The plaintiffs attempted to overcome the failure of their expert witnesses by citing *Femco v. Colman*,<sup>350</sup> in which the Indiana Court of Appeals held that under the specific circumstances the trial court did not err in not striking the affidavit of a treating physician which, along with other materials, created a triable issue

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341. *See id.*

342. *Id.* "There is no medical or scientific literature which supports the conclusion that the chemicals can cause RADS at any dose." *Id.*

343. *See id.* at 681-82.

344. *See id.* at 682.

345. *See id.*

346. *See id.*

347. *See id.*

348. *Id.*

349. *See id.* (citing *Turner v. Davis*, 699 N.E.2d 1217, 1220 (Ind. Ct. App. 1998)).

350. 651 N.E.2d 790 (Ind. Ct. App. 1995).



of fact sufficient to survive summary judgment.<sup>351</sup> The court distinguished the *Femco* decision by noting that, in that case, it was established that the plaintiff, in fact, had been exposed to the substance at issue, whereas in the present case, there was no credible evidence that the plaintiffs were exposed to any level of the chemicals in question.<sup>352</sup> Therefore, while it may have been appropriate for the physician in *Femco* to assume, without personal knowledge, that the plaintiff had suffered exposure to the chemical, there was nothing within the record in the present case to allow the experts to assume such an exposure.<sup>353</sup>

In *U-Haul International, Inc. v. Nulls Machinery & Manufacturing Shop*,<sup>354</sup> a U-Haul truck collided with decedent's car when a valve in the U-Haul's breaking system allegedly failed. The decedent's estate sued both U-Haul the producers of the brake valve component ("Valve Defendants").<sup>355</sup>

Each Valve Defendant filed a separate motion for summary judgment, claiming that the plaintiff's product liability action failed because the plaintiff could not designate evidence demonstrating that the brake valve was defective and was a cause of the accident.<sup>356</sup> The trial court granted the Valve Defendants' motions, essentially leaving U-Haul, the truck's owner, as the remaining defendant. U-Haul filed a motion to correct error, which was denied, and then appealed.<sup>357</sup>

In a unanimous decision, the Indiana Court of Appeals first considered whether co-defendant U-Haul had standing to appeal the trial court's grant of summary judgment in favor of the Valve Defendants. U-Haul argued that it was prejudiced by the summary dismissal of the Valve Defendants because, under Indiana's Comparative Fault Act, the jury would be required to allocate fault among all culpable parties and non-parties.<sup>358</sup> A dismissed party may not be named as a non-party.<sup>359</sup> Because the jury could not apportion fault against the dismissed Valve Defendants, U-Haul contended that it suffered an exposure to greater liability for the plaintiff's damages.<sup>360</sup>

Finding this issue to be one of first impression, Judge Friedlander turned to authority from other jurisdictions for guidance. The court examined the decisions in *Hammond v. North American Asbestos Corp.*,<sup>361</sup> *Koller v. Liberty*

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351. See *id.* at 794.

352. See *id.*

353. See *id.*

354. 736 N.E.2d 271 (Ind. Ct. App. 2000).

355. See *id.* at 273.

356. See *id.* at 274.

357. See *id.*

358. See *id.* at 275.

359. See *id.* (citing *Handrow v. Cox*, 575 N.E.2d 611 (Ind. 1991); *Rausch v. Reinhold*, 716 N.E.2d 993 (Ind. Ct. App. 1999)).

360. See *id.*

361. 565 N.E.2d 1343 (Ill. Ct. App. 1991).



*Mutual Insurance Co.*,<sup>362</sup> and *Tinker v. Kent Gypsum Supply, Inc.*<sup>363</sup> The court found that these three decisions shared common principles in determining whether a co-defendant had standing to appeal the dismissal of another defendant from an action.<sup>364</sup> All three cases start with the proposition that, in order to have standing to challenge a co-defendant's dismissal, a remaining defendant must demonstrate that it is aggrieved by the co-defendant's exit from the action.<sup>365</sup>

The courts diverged, however, on whether the party claiming prejudice as a result of the dismissal is required to take affirmative action in the trial court proceeding to establish standing to challenge the matter on appeal.<sup>366</sup> The Illinois and Wisconsin courts of appeal, upon determining that the appellant had suffered prejudice by the dismissal of a co-defendant, proceeded directly to an analysis of whether the appellant's interests warranted a finding of standing.<sup>367</sup> Upon finding prejudice, the Washington Court of Appeals, however, took the additional step of assessing whether the appellant had acted to preserve its right to appeal the ruling.<sup>368</sup> Thus, the Indiana Court of Appeals determined it could adopt one of two distinct analyses: the first permitting a party to challenge the dismissal of a co-defendant upon demonstrating the dismissal negatively affected the appellant's interests in the litigation; the second permitting appeal if the remaining defendant can show prejudice and took steps to preserve the issue.<sup>369</sup>

In selecting which rule to apply, the court then turned to guidance from prior Indiana decisions. In particular, the court examined the Indiana Supreme Court's reasoning in *Bloemker v. Detroit Diesel Corp.*<sup>370</sup> In *Bloemker*, a plaintiff sued three defendants. The trial court granted plaintiff's motion to dismiss one of the defendants. The remaining two defendants moved for summary judgment, which the trial court also granted. The Indiana Supreme Court subsequently overturned the grants of summary judgment in favor of the two defendants. On cross-appeal, the two defendants argued that the dismissal of the first defendant should likewise be set aside.

Finding that the remaining two defendants had not preserved the issue on appeal, the court stated:

In cases where motions at the conclusion of the plaintiff's evidence threaten to remove a party that a remaining defendant claims should remain a party [or] non-party for purposes of allocation of fault, such remaining defendant may and should oppose the motion [or] request that any ruling be delayed until the remaining defendant has an opportunity

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362. 526 N.W.2d 799 (Wis. Ct. App. 1994).

363. 977 P.2d 627 (Wash. Ct. App. 1999).

364. *U-Haul*, 736 N.E.2d at 277-78.

365. *See id.* at 278.

366. *See id.*

367. *See id.*

368. *See id.*

369. *See id.*

370. 687 N.E.2d 358 (Ind. 1997).



to present his evidence. In such event, the nature and purpose of the Indiana Comparative Fault Act, together with the efficient administration of justice, would normally result in a trial court's refusal to prematurely dismiss and discharge such parties. In the present case, [the remaining defendant] did not object to the dismissals or otherwise assert any claim that [the other parties] should remain for purposes of allocation of fault. Because the statutory burden of proof is upon the defendant with respect to the nonparty defense, failure to timely present such an objection waives the defense as to the dismissed parties.<sup>371</sup>

The *Bloemker* court found the rationale justifying application of these principles to dismissals at the conclusion of the plaintiff's case applied also to defendants dismissed before trial by summary judgment.<sup>372</sup>

The Indiana Court of Appeals determined that in order to establish standing to appeal the dismissal of a co-defendant from an action, the remaining defendant must resist the dismissal of the co-defendant at the trial court.<sup>373</sup>

[A] defendant may not sit idly by as its interests are subjected to possible prejudice when other co-defendants seek dismissal from the case, and then, at a later stage in the proceedings, seek to protect that interest after dismissal has occurred. In such cases, the court will examine the actions undertaken to protect its interest at the stage where the co-defendant sought dismissal, in order to determine whether the issue was preserved.<sup>374</sup>

The failure of defendant to articulate to the trial court any claim it would later assert upon appeal concerning the prejudicial effect of the dismissal of one of its co-defendants waives the claim for purposes of appeal.<sup>375</sup>

Having determined the test and standard for establishing a co-defendant's standing to challenge on appeal the dismissal of a co-defendant, the Indiana Court of Appeals determined that U-Haul had adequately taken steps to oppose the dismissal of the Valve Defendants and therefore preserved its right to raise the issue on appeal.<sup>376</sup>

Having determined that U-Haul had standing to challenge the dismissal of the Valve Defendants from the action, the court then turned to U-Haul's contention that the grant of summary judgment was inappropriate. The court noted that, in order to establish a *prima facie* case of strict liability under the IPLA, the plaintiff and for purposes of the appeal, U-Haul were required to demonstrate that "(1) the valve was defective and unreasonably dangerous, (2) said defective

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371. *Id.* at 360 (quoting *Bowles v. Tatom*, 546 N.E.2d 1188, 1190 (Ind. 1989)).

372. *See U-Haul*, 736 N.E.2d at 279.

373. *See id.*

374. *Id.* at 279-80.

375. *See id.* at 280.

376. *See id.* U-Haul filed a brief in opposition to the Valve Defendants' motions for summary judgment, and filed a motion to correct error following the ruling. *See id.*



condition existed at the time the product left the Valve Defendants' control, and (3) the defective condition was a proximate cause of the accident.<sup>377</sup> The Valve Defendants sought summary judgment contending that the plaintiff could not establish that the valve in question was defective and, alternatively, that if it was defective, it was not the proximate cause of the collision.<sup>378</sup>

The Valve Defendants pointed to plaintiff's interrogatory responses, in which it advised the Valve Defendants that the plaintiff's contention that the valve was defective was based upon a post-accident inspection conducted by U-Haul. However, in responding to similar interrogatories, U-Haul advised the Valve Defendants that it did not believe the valve was defective. The Valve Defendants further designated expert witness testimony stating that the valve in question was not defective. The court of appeals found that the Valve Defendants' designated evidence specifically refuted the allegations that the valve was defective and was a cause of the accident, and were sufficient to shift the burden to U-haul to demonstrate the existence of a genuine issue of fact on the elements of defective condition and proximate cause.<sup>379</sup>

In response to the Valve Defendant's motions for summary judgment, U-Haul designated testimony from three expert witnesses. The first testified that he had concluded that there was a leak somewhere in the brake system that caused the master cylinder to empty.<sup>380</sup> The second expert testified by affidavit that, during his examination of the brake assembly, he observed manufacturing and design defects, which caused leakage of brake fluid from the brake assembly. The witness concluded that the defects were present at the time of manufacture and design. The third witness testified by affidavit that the collision would not have occurred had the auto transport trailer had operable trailer brakes.<sup>381</sup>

Reviewing the designated materials, the Indiana Court of Appeals concluded that there remained a question of fact with respect to whether the valve was defective.<sup>382</sup> While the Valve Defendants' expert opined that the valve was not defective, all of the other experts agreed that the valve was defective in some respect. Thus, it could not be said that there was no genuine issue of material fact regarding the question of whether the valve was defective.<sup>383</sup>

However, this did not preclude the grant of summary judgment in favor of the Valve Defendants. Considering the designated materials, the court of appeals determined that none of the four experts testified both that the brake valve leaked and that the leak was a proximate cause of the accident.<sup>384</sup> The court found that only one expert offered an opinion that supported U-Haul's claim of proximate cause by stating generally that the collision would not have occurred if the brakes

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377. *Id.* at 281.

378. *See id.*

379. *See id.* at 281-82.

380. *See id.* at 283.

381. *See id.*

382. *See id.* at 284.

383. *See id.*

384. *See id.*



were operable. The expert did not state that the brakes were rendered inoperable as a result of a leak caused by a defective valve, and in fact was not qualified to render an opinion on the defective condition of the valve.<sup>385</sup>

The court of appeals determined that, while the basic purpose of a vehicle brake system is within the comprehension of lay persons, the design and manufacture of the components of a brake system are not.<sup>386</sup> For this reason, it was incumbent upon the parties opposing the Valve Defendants' motion for summary judgment to designate expert evidence refuting the Valve Defendants' evidence regarding proximate cause.<sup>387</sup> Because U-Haul was unable to do so, it could not successfully challenge the grant of summary judgment in favor of its co-defendants.<sup>388</sup>

## V. PREEMPTION

During the survey period, Indiana courts twice managed forays into the semi-esoteric world of federal preemption in a product liability context. In the first of the two cases, *Dow Chemical Co. v. Ebling*,<sup>389</sup> Christina and Alex Ebling began experiencing seizures shortly after they and their parents moved into the Prestwick Square Apartments in February 1994. In April 1993, Prestwick Square had entered into a pest control service agreement with Affordable Pest Control, which obligated Affordable to provide regular pest control for roaches, ants, silverfish, mice, and rats. Affordable applied a pesticide commonly known as "Dursban" in the apartment units on a preventive basis. In April 1994, Prestwick Square canceled its service agreement with Affordable and began using its own maintenance personnel to apply Creal-O, a ready-to-use pesticide.<sup>390</sup>

DowElanco, now known as Dow AgroSciences, manufactured and distributed Dursban pesticide products pursuant to registrations with the Environmental Protection Agency (EPA).<sup>391</sup> As part of the registration process, the EPA provided Dow Chemical Company<sup>392</sup> with stamped and accepted labels for its Dursban pesticide products, which the EPA authorized for use in and around residential structures, including apartments and apartment complexes.<sup>393</sup>

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385. *See id.*

386. *See id.* at 285.

387. *See id.*

388. *See id.*

389. 723 N.E.2d 881 (Ind. Ct. App.), *vacated by* 741 N.E.2d 1249 (Ind. 2000).

390. *See id.* at 888-89.

391. *See id.* at 889. "Dursban" is a trademark of Dow AgroSciences LLC. Dursban 2E was registered with the EPA in 1982. Dursban L.O. was registered with the EPA in 1984. *See id.*

392. Dow AgroSciences was known as DowElanco from 1989 until 1998. Dow AgroSciences is now an indirect, wholly-owned subsidiary of The Dow Chemical Company. In the interest of consistency, this survey Article refers to DowElanco by its current name, Dow AgroSciences. The Dow Chemical Company received the initial EPA registration approvals for Dursban.

393. *See Ebling*, 723 N.E.2d at 889. The active ingredient in Dursban is chlorpyrifos. In



Louisville Chemical Company formulated a ready-to-use pesticide known as Creal-O. As part of the registration process for Creal-O, the EPA permitted Louisville Chemical to adopt and incorporate the safety and toxicological data submitted by the manufacturers of Creal-O's active and inert ingredients. The EPA registered and authorized Creal-O's use in and around apartments and apartment complexes.<sup>394</sup>

Affordable did not provide the Eblings or Prestwick Square with any of Dursban's EPA-approved warnings and labeling information. Although Louisville Chemical provided Prestwick Square with the EPA-approved labeling for Creal-O, it did not provide the Eblings with the label until after their exposure to it.<sup>395</sup>

The Eblings sued Dow AgroSciences, Louisville Chemical, Affordable Pest Control and others, claiming that their children developed seizures and other health conditions as a result of their exposure to Dursban and Creal-O.<sup>396</sup> After the trial court denied their motions for summary judgment, Dow AgroSciences, Louisville Chemical, and Affordable appealed. On appeal, the court of appeals faced five separate issues.<sup>397</sup> This survey Article will examine only the first of those issues: whether federal law preempts the Eblings' state law product liability claims.

The court of appeals began its lengthy and thorough analysis of federal preemption by reciting a history of the federal preemption doctrine, culminating in the court's recognition that the critical question in any preemption analysis is "whether Congress intended that federal regulation supersede state law."<sup>398</sup> In making such a determination, the *Ebling* court pointed out that "any understanding of the scope of a preemption statute must rest primarily on 'a fair understanding of congressional purpose,' as discerned from language of the preemption statute and the 'statutory framework' surrounding it."<sup>399</sup>

Having first acknowledged the relevant analysis, the court next conducted a detailed review of the extensive nature of federal oversight of pesticide

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November of 1994, Dow AgroSciences voluntarily submitted to the EPA reports of allegations of adverse effects resulting from exposure to pesticide products containing chlorpyrifos. The EPA and Dow AgroSciences disputed whether such reports were timely submitted. The parties eventually entered into a consent decree in the summer of 1995, whereby Dow AgroSciences paid a civil penalty and the EPA did not withdraw or alter its registrations for Dursban L.O. or Dursban 2E. *See id.*

394. *See id.*

395. *See id.* at 890.

396. *See id.* at 888.

397. *See id.*

398. *Id.* at 891.

399. *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (emphasis in original)). The *Ebling* court added, "[a]lso relevant to the analysis is the 'structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.'" *Id.* (quoting *Medtronic*, 518 U.S. at 470 (citation omitted)).



registration mandated both by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the EPA.<sup>400</sup>

Pesticides such as Dursban and Creal-O sold or distributed in the United States must be registered with the EPA in accordance with the requirements of FIFRA and its associated regulations. The purpose of the registration process is to prevent unreasonable adverse effects on the environment, which includes not only land, air and water, but also humans and animals.<sup>401</sup>

The court's discussion of FIFRA regulation culminated in its quotation of the express preemption language found in section 136v(b) of FIFRA:

(a) In general

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity

Such state shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.<sup>402</sup>

The *Ebling* court next traced the relatively recent refinement of preemption law from *Ferebee v. Chevron Chemical Co.*,<sup>403</sup> through *Papas v. Upjohn Co.*,<sup>404</sup> and *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*,<sup>405</sup> to *Cipollone v. Liggett Group, Inc.*<sup>406</sup> In tracking the decisions after *Cipollone*, the *Ebling* court cited the Supreme Court's vacation and remand of two federal circuit court judgments, *Papas v. Zeecon Corp.*<sup>407</sup> and *Arkansas-Platte & Gulf Partnership v. Dow Chemical Co.*,<sup>408</sup> as an indication that the Supreme Court's *Cipollone* preemption analysis should apply in FIFRA preemption determinations.<sup>409</sup> On remand, the federal circuits in both *Papas* and *Arkansas-Platte* held that FIFRA expressly preempts state law failure to warn claims based upon inadequate labeling.<sup>410</sup> The *Ebling* court pointed out that thereafter, all of

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400. See *id.* at 891-92.

401. *Id.* at 891 (citing 7 U.S.C. § 136a(a) (2000)).

402. *Id.* at 892 (quoting 7 U.S.C. § 136v (2000)).

403. 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984).

404. 926 F.2d 1019 (11th Cir. 1991) [hereinafter *Papas I*].

405. 959 F.2d 158 (10th Cir. 1992) [hereinafter *Arkansas-Platte I*].

406. 505 U.S. 504 (1992).

407. 505 U.S. 1215 (1992) (vacating and remanding *Papas I*).

408. 506 U.S. 910 (1992) (vacating and remanding *Arkansas-Platte I*).

409. *Ebling*, 723 N.E.2d 881, 894 (Ind. Ct. App.), *vacated by* 741 N.E.2d 1249 (Ind. 2000).

410. See *id.* (citing *Papas v. Upjohn Co.*, 985 F.2d 516, 518 (11th Cir.), *cert. denied sub nom. Papas v. Zeecon Corp.*, 510 U.S. 913 (1993) [hereinafter *Papas II*]; *Arkansas-Platte & Gulf P'ship v. Van Waters, Inc.*, 981 F.2d 1177, 1179 (10th Cir.), *cert. denied sub nom. Arkansas-Platte & Gulf*



the federal circuits that have addressed the issue, as well as an "overwhelming majority of state supreme and appellate courts," have concluded that FIFRA "expressly preempts state common law claims for damages that are based on an alleged failure to warn or convey information about a product through its EPA-approved labeling."<sup>411</sup> Thus, the *Ebling* court concluded that FIFRA expressly preempts all state labeling or packaging requirements that are "in addition to or different from" those required by FIFRA.<sup>412</sup>

Having decided the scope and extent of FIFRA express preemption, the *Ebling* court turned its attention to whether the legal duty forming the basis of each of the Eblings' common law claims constituted "'a requirement[] for labeling or packaging different in addition to or different from' the EPA regulations."<sup>413</sup>

In an effort to avoid preemption, the Eblings put forward what the court called a "broader label dissemination theory," by which they argued that Dow AgroSciences and Louisville Chemical failed to provide the Eblings with the EPA-approved labeling information for Dursban and Creal-O.<sup>414</sup> The "predicate duty" underlying the Eblings' novel argument would be "a state common law duty imposed on pesticide registrants to provide additional copies of EPA-approved labeling information to purchasers/users . . . with instructions that these purchasers/users disseminate this labeling information to the end customers and/or bystanders who might be exposed to the pesticides."<sup>415</sup> The court responded to the broader label dissemination theory by finding that it necessarily challenged the product's labeling and was, therefore, preempted:

[A]ny written information that a pesticide registrant disseminates with a pesticide is considered "labeling" under FIFRA, and any obligation placed upon a registrant in this regard is necessarily a labeling requirement. From this language, it is clear that Congress intended to preempt state common law actions that would impose requirements on a registrant to disseminate additional written matter with its product, regardless of whether this matter was identical to the EPA-approved labeling information.

Therefore, any supplemental materials or instructions to end-users/applicators at a particular time would constitute "labeling" as the term is defined by FIFRA. In essence, the Eblings challenge the adequacy of the scope of the warnings on the Dursban and Creal-O labels. If the Eblings prevailed on their claims of failure to warn under such a theory, a state imposed labeling requirement not included in FIFRA would be established. This additional state regulation is

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v. Dow Chem. Co, 510 U.S. 813 (1993) [hereinafter *Arkansas-Platte I*].

411. *Id.* at 894-95.

412. *Id.* at 895.

413. *Id.* at 896 (quoting 7 U.S.C. § 136v(b)).

414. *Id.*

415. *Id.*



precisely what Congress precluded.<sup>416</sup>

The Eblings also alleged that Louisville Chemical negligently failed to warn, instruct, and train the apartment complex employees to ventilate the apartments before and after pesticide application and not to apply pesticides when tenants were present. The court rejected the Eblings' attempts to avoid preemption of labeling claims because, according to the court, their claims "essentially challenge the adequacy of instructions and warnings contained in the EPA-approved Creal-O labeling."<sup>417</sup> The legal duties that the Eblings sought to impose "constitute requirements for labeling in addition to or different from those required by the EPA regulations, and therefore, are equally preempted by FIFRA."<sup>418</sup>

The court next examined whether FIFRA preempted the Eblings' regulatory non-compliance claim against Dow AgroSciences, which claimed negligence *per se* arising out of Dow AgroSciences' alleged violation of EPA reporting obligations. The Eblings' discovery responses charged that if Dow AgroSciences had not allegedly violated EPA reporting obligations and "had more promptly reported to the EPA claims and allegations of adverse effects associated with exposure to Dursban, the EPA would have imposed '*major changes to the product labels, to the material safety data sheets and other items*' prior to the Eblings' exposure to Dursban."<sup>419</sup> Dow AgroSciences argued that the Eblings' "noncompliance theory" was merely a "disguised challenge to the legal sufficiency of the warnings on the EPA-approved product labeling."<sup>420</sup> The court agreed with Dow AgroSciences. Based upon the Eblings' discovery responses, the court wrote that "it seems quite clear that the nature of the Eblings' regulatory noncompliance claim as disclosed by the record is inextricably related to the adequacy of the warnings and precautions on the EPA-approved Dursban label."<sup>421</sup> Indeed, the court recognized that the Eblings would be required to prove that the information on the EPA-approved label was insufficient and that a different label would have been forthcoming. Accordingly, the court held that FIFRA expressly preempts the regulatory noncompliance claim "to the extent that it relies on a state-law 'requirement[] for labeling . . . in addition to or different from' those required by the EPA."<sup>422</sup>

When it came to the Eblings' design defect claims, however, the court did

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416. *Id.* at 897 (footnote omitted). The court added that its conclusion is consistent with the "majority of cases in other jurisdictions which have generally concluded that FIFRA preempts failure to warn or convey information claims against pesticide manufacturers that are not directly based on the language on the pesticide label." *Id.*

417. *Id.* at 898.

418. *Id.* The court also rejected similar failure to warn claims the Eblings asserted against Affordable Pest Control. *See id.*

419. *Id.* at 899 (emphasis in original).

420. *Id.*

421. *Id.*

422. *Id.* (citation omitted).



not believe that those claims were preempted. After a brief discussion about Indiana Code section 34-20-2-1 and relevant authorities from other jurisdictions, the court concluded that FIFRA does not preempt the Eblings' design defect claim because they are not predicated on failure to warn or convey information through the products' labeling and packaging.<sup>423</sup> In doing so, the court noted that a product liability claim premised on a design defect pursuant to the IPLA focuses upon the dangerous propensities of a product "due to its inherent properties and is not predicated on the adequacy of warnings on a product's labeling or packaging."<sup>424</sup> In the final analysis, the court "fail[ed] to see how our state-imposed standard of care relating to product design and manufacturing can constitute a labeling requirement under FIFRA."<sup>425</sup>

Relying on cases such as *Lescs v. Dow Chemical Co.*,<sup>426</sup> *Papike v. Tambrands, Inc.*,<sup>427</sup> and *Haddix v. Playtex Family Products Corp.*,<sup>428</sup> Dow AgroSciences countered that FIFRA expressly preempts design defect claims because Indiana employs a consumer expectations test for determining liability in defect claims and "consumers may not expect more than the FIFRA-mandated labeling provides."<sup>429</sup> In rejecting Dow AgroSciences' argument, the majority reiterated that by recognizing the Eblings' design defect claims, it was not requiring information on the Dursban or the Creal-O labeling to be "different from' or 'in addition to'" the information FIFRA requires.<sup>430</sup> The court wrote, "To the contrary, we are merely recognizing a duty of manufacturers of potentially dangerous products to guard against design defects. This requirement does not frustrate the will of Congress or interfere with FIFRA's purpose of establishing a uniform standard for labeling and packaging."<sup>431</sup>

Chief Judge Sharpnack wrote an opinion concurring in part and dissenting in part.<sup>432</sup> Judge Robb wrote a separate opinion concurring in part and concurring in result in part.<sup>433</sup> The differences in opinion among the judges all were related to the preemption analysis. Chief Judge Sharpnack concurred with respect to the handling of each of the Eblings' failure to warn claims, but disagreed with the majority about how to handle their design defect claim.<sup>434</sup> Chief Judge Sharpnack concluded that FIFRA preempts the Ebling's product liability claims against Dow AgroSciences and Louisville Chemical, even the design defect claim, to the extent that those claims are based upon consumer

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423. See *id.* at 900.

424. *Id.* at 901.

425. *Id.* at 901.

426. 976 F. Supp. 393 (W.D. Va. 1997), *aff'd*, 168 F.3d 482 (4th Cir. 1999).

427. 107 F.3d 737 (9th Cir. 1997).

428. 138 F.3d 681 (7th Cir. 1998).

429. *Ebling*, 723 N.E.2d at 901 (citation omitted).

430. *Id.* at 902 (citation omitted).

431. *Id.*

432. See *id.* at 910 (Sharpnack, C.J., concurring in part and dissenting in part).

433. See *id.* (Robb, J., concurring).

434. See *id.* at 913 (Sharpnack, C.J., concurring in part and dissenting in part)..



expectations.<sup>435</sup> Permitting recovery based upon consumer expectations different from those supported by the information FIFRA requires on its labels is, according to Chief Judge Sharpnack, in effect no different from allowing recovery for failure to make warnings different from, or in addition to, those set forth on the label.<sup>436</sup> Accordingly, he dissented to the extent that the majority opinion would permit recovery on a design defect claim based upon consumer expectations.<sup>437</sup> However, Chief Judge Sharpnack did not believe FIFRA would preempt a "claim based upon negligence in design where it can be shown that an alternative design was reasonably available that would have eliminated or significantly reduced the risk of harm that was caused to the plaintiff."<sup>438</sup> Thus, Chief Judge Sharpnack concurred with the majority "[t]o the extent that the majority would permit a design defect claim based upon alternative design."<sup>439</sup>

Judge Robb disagreed with the majority's holding that the EPA-approved written information accompanying a pesticide constitutes "labeling" pursuant to section 136v(b) of FIFRA.<sup>440</sup> Rather, she was convinced that the dissemination of such information comprises "packaging" pursuant to the foregoing section.<sup>441</sup> Regardless, whether the Eblings' state common law failure to warn claim is characterized as falling under the term "labeling" or "packaging," Judge Robb concluded that FIFRA preempts it.<sup>442</sup>

On August 15, 2000, the Indiana Supreme Court accepted transfer of the *Ebling* case.<sup>443</sup> At the time of this writing, the court has not yet issued a decision.

A few months after the *Ebling* decision, the court of appeals revisited express preemption in the case of *Rogers v. Cosco, Inc.*<sup>444</sup> The case involved Shelette Rogers' infant daughter who injured her cervical vertebrae in a traffic accident. At the time of the accident, Rogers' daughter was riding in a child restraint seat manufactured by defendant Cosco. Rogers argued that Cosco improperly designed the seat apparently because it did not offer sufficient head and neck support to a child the size of Rogers' thirty-two pound daughter. The trial court

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435. See *id.* In reaching that conclusion, Chief Judge Sharpnack agreed with the analysis of the court in *Lescs v. Dow Chemical Co.*, 974 F. Supp. 393 (W.D. Va. 1997).

436. See *Ebling*, 723 N.E.2d at 911.

437. See *id.*

438. *Id.* Chief Judge Sharpnack so determined because such a claim "would not be based upon inadequacy of warnings or consumer expectations about the product that were in addition to the information concerning the product required by FIFRA." *Id.*

439. *Id.*

440. *Id.* at 912 (Robb, J., concurring).

441. *Id.* Judge Robb noted that neither the text nor the legislative history of FIFRA provides a definition of the term "packaging." She believed the term to refer to the dissemination of the written information that accompanies a pesticide. Therefore, she reasoned that "'packaging' entails the dissemination of the EPA approved written information that accompanies a pesticide, referred to as 'labeling' under section 136v(b) of FIFRA." *Id.*

442. See *id.* at 913.

443. 741 N.E.2d 1249 (Ind. 2000)

444. 737 N.E.2d 1158 (Ind. Ct. App. 2000).



granted Cosco's motion for summary judgment after deciding that the Federal National Traffic and Motor Vehicle Safety Act ("Safety Act") preempted Rogers' state law claims.<sup>445</sup>

On appeal, the first of the three issues was whether the Safety Act expressly preempts Rogers' state court action. The purpose of the Safety Act is "to reduce traffic accidents and death and injuries to persons resulting from traffic accidents."<sup>446</sup> The Safety Act's preemption clause reads, in relevant part:

When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of the State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.<sup>447</sup>

The Safety Act also contains a so-called "savings clause" providing that "compliance with a motor vehicle safety standard under this chapter does not exempt a person from liability at common law."<sup>448</sup>

The applicable federal safety standard, Federal Motor Vehicle Safety Standard 213 (Standard 213), "allows a manufacturer to meet its performance criteria regarding child restraint systems through the use of booster seats, and it contains both minimum performance and specific design requirements for child booster seats."<sup>449</sup> Standard 213 also allows a manufacturer to meet upper torso child restraint standards by using a forward barrier, such as the shield placed on Cosco's seat. In addition, Standard 213 allows manufacturers to sell booster seats for use by children under forty pounds.<sup>450</sup>

After addressing some preliminary precepts about federal preemption, the court recognized that congressional intent is a threshold concept in preemption analysis and that "[t]he intent of Congress may be 'express,' i.e., expressly stated in the statute, or 'implied,' i.e., implicitly stated in the statute's structure and purpose."<sup>451</sup> The court first examined express preemption. Cosco argued that the legislature's decision to include product liability common law negligence actions within the framework of the IPLA renders the Safety Act's savings clause inapplicable because product liability claims in Indiana are statutory, not common law claims.<sup>452</sup> In assessing Cosco's argument, the *Rogers* court examined the intent of the Safety Act, the language of the IPLA, and Cosco's arguments about Rogers' crashworthiness claim. On the first score, congressional intent, the court's review of House and Senate reports led it to the following conclusion:

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445. *See id.* at 1162-63.

446. *Id.* (citing 49 U.S.C. § 30101 (2000)).

447. *Id.* (citing 49 U.S.C. § 30103(b)(1)).

448. *Id.* (citing 49 U.S.C. § 30103(e)).

449. *Id.*

450. *See id.* (citing Standard 213, § 5.5.2(f)).

451. *Id.* at 1164 (citation omitted).

452. *See id.*



Allowing common law tort remedies, while at the same time pre-empting particular safety standards found in motor vehicle statutes or administrative regulations, appears to be a congressional compromise between the interest of Congress in uniformity and its interest in permitting States to compensate accident victims upon the basis of general common law tort standards. It is also apparent that the application of tort standards can sometimes complement the purposes of the Safety Act and attendant regulations setting forth minimum safety standards by supplying manufacturers with an additional incentive to design a safe product.

The intent of the Safety Act is to pre-empt state statutes and administrative regulations promulgated with the specific purpose of regulating motor vehicle safety in a manner different from that found in the Safety Act and federal regulations. We conclude, however, that Congress did not intend that the application of a state's general common law standards should be "rendered inapplicable" by the codification of that state's common law as it applies to product liability actions. Indeed, we conclude that Congress specifically intended that the general standards of the common law should assist in reducing "death and injuries to persons resulting from traffic accidents."<sup>453</sup>

In response to Cosco's argument that the governing product liability doctrine in Indiana is statutory, the *Rogers* court pointed out that, although the IPLA now governs product liability actions, it is "legal theory derived from the common law, albeit within the procedural framework of the [IPLA]."<sup>454</sup> Although Cosco cited portions of the IPLA that seem to derogate common law, the *Rogers* court responded that those provisions were not at issue in the case and that "the presence of such provisions in derogation of the common law has not prevented us from recognizing that the [IPLA], as it applies to strict liability claims, is a codification of the common law of products liability."<sup>455</sup> In its final analysis on the point, the court wrote:

The upshot is that although certain procedural portions of the [IPLA] are to be strictly construed as in derogation of common law, the viability of tort claims made under the [IPLA], whether sounding in negligence or strict liability, is to be determined by reference to the common law from which the claims originated. This is so because the common law of products liability negligence is simply restated in the [IPLA]. Rogers's claims in the present case arise from the general common law, and it is these types of claims that are the subject of the Safety Act's saving clause.<sup>456</sup>

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453. *Id.* at 1165.

454. *Id.*

455. *Id.*

456. *Id.*



The *Rogers* court next focused on implied conflict preemption, having earlier in the opinion explained the doctrine as follows:

Implied pre-emption is manifested when a state law conflicts with federal law. This "implied conflict pre-emption" occurs either where it is impossible to comply with both federal and state or local law, or where state law stands as an obstacle to the accomplishment and execution of federal purposes and objectives.<sup>457</sup>

After a brief discussion about *Geier v. American Honda Motor Co.*,<sup>458</sup> the most recent U.S. Supreme Court pronouncement on the subject, the court cited evidence designated by both parties that Standard 213 allows but does not require the use of a booster seat such as Cosco's in protecting children from injuries. The court also cited evidence that further convinced it that Standard 213 is intended to establish only minimum safety standards for child restraint systems. Citing *Geier* for the proposition that a state may impose a stricter standard through the agency of its general common law of torts, the *Rogers* court concluded that there is no conflict between Rogers' proposed tort remedy and the minimum standards of Standard 213.<sup>459</sup> Thus, according to the court, "Rogers's attempt to impose a greater safety standard through the prohibition of booster seats such as [Cosco's] for children under forty pounds is not pre-empted by the Safety Act."<sup>460</sup>

#### CONCLUSION

The 2000 survey period once again proved that Indiana courts and practitioners are actively defining, re-defining, developing, and refining Indiana product liability law. The quality of scholarship and advocacy developed by these decisions recommends our state's judiciary and counselors at bar. Product liability, perhaps more than any other substantive area of Indiana law, continues to be fertile ground for lawyers and judges looking for opportunities to be creative, insightful, and innovative.

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457. *Id.* at 1164 (citing *In re Guardianship of Wade*, 711 N.E.2d 851, 854 (Ind. Ct. App. 1999)).

458. 529 U.S. 861 (2000).

459. *See Rogers*, 737 N.E.2d at 1166.

460. *Id.*



# **SURVEY OF THE LAW OF PROFESSIONAL RESPONSIBILITY**

**CHARLES M. KIDD\***

## **INTRODUCTION**

The law governing attorneys has a pervasive quality that weaves tightly into American jurisprudence. It is the one body of law all members of the bench and bar have in common, irrespective of the area of substantive law in which an individual concentrates his or her practice.<sup>1</sup> Just as rules, rulings, and statutes change, the ways in which attorneys operate their practices and handle their clients' matters change. At one time, for example, the use of a contingent fee agreement with a client was considered only marginally ethical. It was thought unseemly for a lawyer to take a "cut" of a client's recovery.<sup>2</sup> Views on the subject changed, however, and the widespread use of contingent fee agreements opened the door for many clients who otherwise could not have afforded the costs of expensive, protracted litigation.<sup>3</sup> The developing role of contingency fees represented a clear change in the fabric of American law in that, by changing the way in which lawyers practiced, the way in which client matters were handled changed as well.

This article highlights a number of legal developments that have had a direct bearing on the law of professional responsibility. In subtle as well as in overt ways, regulating lawyer behavior has a noticeable impact on the ways client matters are handled. New rules and rulings have made it very important that lawyers keep abreast of changes in the area of professional responsibility to ensure that their behavior conforms to standards expected of every lawyer.

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1. See IND. PROFESSIONAL CONDUCT RULE Preamble (2000).

2. See CANONS OF PROFESSIONAL ETHICS OF THE ABA Canon 13 (1908); see also ABA Comm. On Prof'l Ethics and Grievances, Formal Op. 246 (1942).

The purchase of shares of stock in the corporation by the lawyer is a purchase by the lawyer of an interest in the subject matter of litigation to be instituted and conducted by the lawyer for the purpose of putting an end to the alleged appropriation by the officers and directors to their own use of income and assets of the corporation. A successful suit would better the value of the stock to the advantage of its holders and so the lawyer would profit from his purchase, as well as from compensation for his services.

*Id.*

3. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35, cmt. b (2000).



## I. RECENT RULE CHANGES

*A. The Background of the Admission and Discipline Rules*

One of the state's primary sources of the law governing lawyer conduct is Indiana's Rules of Professional Conduct. During the relevant survey period, there were no changes to the text of this body of law from the prior survey period. However, significant developments occurred in the procedural rules governing lawyer disciplinary action, which are important for all members of the bar to understand.<sup>4</sup>

Like other rules promulgated by the Indiana Supreme Court, the Indiana Rules for Admission to the Bar and the Discipline of Attorneys ("Indiana Rules for Admission") assist the court in executing its constitutional grant of authority to govern the admission of lawyers to the bar and regulate their conduct once they are admitted.<sup>5</sup> The Indiana Rules for Admission govern all facets of an individual lawyer's continued good standing at least as it relates to their membership in the bar of the Indiana Supreme Court.

For more than thirty years, the procedures used for investigating and prosecuting lawyer disciplinary actions have been contained in Indiana Rules for Admission 23.<sup>6</sup> This rule covers all the features related to the disciplinary process and includes, *inter alia*, the "enabling statute" creating the Disciplinary Commission,<sup>7</sup> the remedies available in cases of lawyer misconduct<sup>8</sup> and the procedures employed to investigate and prosecute disciplinary actions before the Indiana Supreme Court.<sup>9</sup>

Parts of rule 23 have many features akin to the Indiana Trial Rules. However, because lawyer disciplinary actions are *sui generis*,<sup>10</sup> the rule outlines all the steps from the creation of the Disciplinary Commission through the conclusion of disciplinary action, and beyond.<sup>11</sup> Changes to this rule and the procedures by

4. See IND. ADMISSION AND DISCIPLINE RULES (amended 2001).

5. See IND. CONST. art. VII, § 4.

The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal, and retirement of justices and judges; supervision of the exercise of jurisdiction by the other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction.

*Id.*

6. See ADMIS. DISC. R. 23.

7. See *id.* § 6.

8. See *id.* § 3.

9. See *id.* § 10.

10. See IND. CONST. art. VII, § 4.

11. Disbarred and suspended lawyers have an obligation to see that the client matters under their control are distributed to other lawyers and turned back over to their clients at the time they leave the bar. See ADMIN. DISC. R. 23, § 27. In addition, suspended lawyers who eventually seek reinstatement to the bar must comply with the appropriate provisions of the rule as well. See *id.*



which lawyer discipline cases are adjudicated can have a tremendous impact on the manner and speed with which lawyer discipline takes place. The full text of the latest round of amendments to this rule follows this article in Appendix A. The rule has been changed in relevant areas, which deserve a relatively detailed examination by all members of the bar. One change involves an alteration to the investigatory procedure for grievances,<sup>12</sup> while the other change relates to the way in which formal disciplinary action is prosecuted.<sup>13</sup>

### *B. Cooperating with an Investigation*

During 1998, the Disciplinary Commission's investigatory procedures were changed to require that lawyers respond to a grievance when such a response was requested by the Commission's Executive Secretary.<sup>14</sup> Characteristically, most complaints against lawyers are dismissed at the beginning of the process as matters which do not raise any substantial question of lawyer misconduct.<sup>15</sup> However, for those grievances that were opened for investigation, the Executive Secretary's request for a response became a demand for information.<sup>16</sup> Under the 1998 rule changes, if a lawyer failed to respond to a grievance when such a response was required, the lawyer's failure to respond was a violation of Indiana Professional Conduct Rule 8.1(b), which required a lawyer to respond to a lawful demand for information from the Disciplinary Commission.<sup>17</sup> Therefore, an otherwise meritless grievance from a client might result in disciplinary action against a lawyer solely based upon the lawyer's failure (or refusal) to answer the grievance.<sup>18</sup>

Effective January 1, 2001, Admission and Discipline Rule 23 was changed to require all lawyers "to cooperate with the Commission's investigation, accept service, comply with the provisions of these rules," and claim their certified mail in person or by agent.<sup>19</sup> Although there is no reported decision in which a lawyer

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§§ 4, 18.

12. *See id.* §10.

13. *See id.* §14.

14. *See id.* §10(a)(2).

15. *See, e.g.,* INDIANA SUPREME COURT DISCIPLINARY COMMISSION, 1999-2000 ANNUAL REPORT OF THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF INDIANA. For example, during the most recent annual report for FY 1999-2000, 1,599 grievances were filed against Indiana attorneys. Of those grievances, 947 were dismissed without further investigation upon a determination that, on their face, they presented no substantial question of misconduct. *See id.*

16. *See* ADMIS. DISC. R. 23, § 10(a)(2). This section provides, "[i]f the Executive Secretary determines that it [the grievance] does raise a substantial question of misconduct, [he shall] send a copy of the grievance by certified mail to the attorney against whom the grievance is filed . . . and shall demand a written response." *Id.*

17. *See* IND. PROFESSIONAL CONDUCT RULE 8.1 (1998).

18. *See, e.g., In re Puterbaugh*, 716 N.E.2d 1287 (Ind. 1999) (applying the response requirement in connection with the initial grievance); *In re Cable*, 715 N.E.2d 396 (Ind. 1999).

19. ADMIS. DISC. R. 23, §10(e) (effective January 1, 2001).



was disciplined for a generalized lack of cooperation, this is a subject that the Indiana Supreme Court has examined in the past.<sup>20</sup> In *In re McClain*,<sup>21</sup> the court was unequivocal in its belief that cooperation by the lawyer being disciplined was essential to the process.

As we have held in the context of attorney discipline cases, the party being investigated has a duty to cooperate in the process. The failure to cooperate may in itself constitute independent grounds for disciplinary charges in some instances. It should not need stating to any judge in this State that the same duty of cooperation exists in judicial disciplinary cases. As the Code of Judicial Conduct makes clear, judges are held to high standards of conduct. Further, our ethical rules make it clear that all judges and attorneys have a duty to cooperate with the investigative process of a disciplinary agency. . . . [T]he duty to cooperate does not require an admission of misconduct nor does it preclude the advocacy of a theory of defense which is contradictory to the allegations of misconduct.

We draw no inference of guilt from Respondent's lack of cooperation with the discovery process. The Court simply takes this opportunity to stress that cooperation with the investigative and discovery processes is expected of any judge under investigation by the Commission and that in the proper case, the failure to cooperate could in itself constitute actionable misconduct. On the other hand, Respondent's uncooperative conduct and delay tactics crossed the line between legitimate discovery dispute and the sort of conduct which is not only antithetical to Respondent's obligations as an attorney and judge, but calls into question the integrity of the judicial disciplinary process.<sup>22</sup>

As an aside, Admission and Discipline Rule 2 has long imposed a duty on lawyers to keep the clerk of the supreme court informed of any change in his or her name and address.<sup>23</sup> Under Admission and Discipline Rule 23, the Clerk (as the keeper of the Roll of Attorneys) is impliedly designated as the agent for service of process for lawyers who fail to update their listing on the Roll.<sup>24</sup> Rule 23 states that a lawyer's failure to provide current information to the Clerk shall be a waiver of service by the lawyer,<sup>25</sup> and the Clerk can create an affidavit of constructive service, if necessary, for the prosecution of disciplinary action

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20. See *In re Crenshaw*, 708 N.E.2d 859 (Ind. 1999) (noting that lawyers have a heightened obligation to comply with demands for information from the Disciplinary Commission that exceeds the obligation imposed upon nonlawyer citizens).

21. 662 N.E.2d 935 (Ind. 1996).

22. *Id.* at 940-41 (internal citations omitted).

23. See ADMIS. DISC. R. 2.

24. See ADMIS. DISC. R. 23, § 12(f).

25. See *id.* §10(e).



against the lawyer.<sup>26</sup>

Also effective January 1, 2001, a lawyer who fails to respond to a grievance can be suspended from the bar until the lawyer submits a response.<sup>27</sup> If the lawyer fails to respond for six months, the lawyer's suspension can be converted into an indefinite suspension from the practice of law.<sup>28</sup> An indefinite suspension requires the lawyer to go through a formal reinstatement proceeding before returning to practice.<sup>29</sup> Such reinstatement requires the lawyer to formally petition the Indiana Supreme Court, take and pass the Multistate Professional Responsibility Examination, and demonstrate his or her fitness to return to practice at a formal hearing.<sup>30</sup> Moreover, the attorney must still submit a response to the initial grievance that began the process.<sup>31</sup>

Except for suspensions based on felony convictions,<sup>32</sup> failing to pay annual registration fees<sup>33</sup> or remaining current on continuing legal education requirements,<sup>34</sup> this rule change represents the first time that a lawyer can be suspended from the practice of law prior to the institution of formal disciplinary action. Obviously, if the misconduct complained of in the grievance is serious enough to warrant disciplinary action in its own right, such a refusal to respond could significantly accelerate the time it currently takes to start and pursue formal disciplinary action. In short, lawyers who engage in misconduct and attempt to stonewall the process will now come to the attention of the supreme court much sooner than they have in the past.

### *C. An Answer Is Required to the Disciplinary Charge*

For the first time in the long history of Admission and Discipline Rule 23, a formal Answer is required to the Verified Complaint for Disciplinary Action.<sup>35</sup> Under the prior version of Admission and Discipline Rule 23, a lawyer facing disciplinary action could decide whether or not to formally answer the Verified Complaint.<sup>36</sup> If a lawyer chose not to file an Answer, that refusal was treated as a general denial of the allegations contained in the Verified Complaint and the

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26. *See id.* § 12(f).

27. *See id.* § 10(f)(2).

28. *See id.* § 10(f)(3).

29. *See id.* § 4(c).

30. *See id.* § 4(a), (b)(1)-(9).

31. *See id.* § 4(b)(4). This section requires the lawyer seeking reinstatement to demonstrate remorse for the conduct which led to his or her suspension. *See id.* It should stand to reason that a lawyer would not be able to make such a demonstration without resolving the matter for which he was suspended in the first place.

32. *See id.* § 11.1.

33. *See id.* § 21(e).

34. *See* ADMIS. DISC. R. 29, § 10.

35. *See* ADMIS DISC. R. 23, § 14(a).

36. *See id.*



Disciplinary Commission was required to prove all the allegations made.<sup>37</sup> Effective January 1, 2001, a formal Answer is now required under similar terms as applied in the Rules of Trial Procedure.<sup>38</sup> The Answer must squarely meet the allegations made in the Verified Complaint with affirmative admissions or denials of the facts alleged therein.<sup>39</sup> Should a lawyer fail to file an Answer, the allegations contained in the Verified Complaint can be deemed admitted and the Disciplinary Commission is then free to apply to the supreme court for a judgment on the Complaint.<sup>40</sup> Again, this amendment is akin to the default provision contained in the Rules of Trial Procedure.<sup>41</sup> As with Rule 23's change requiring a response to the initial grievance against the lawyer, this additional provision should have the effect of speeding up the disciplinary process by forcing a narrowing of the issues very early in the disciplinary process instead of waiting for their development at (or very close to) the trial of the action.

The amendment allows lawyers to file their answer thirty days after service of the Verified Complaint.<sup>42</sup> However, the new rule amendment provides that the lawyer may take one extension of time, as of right, for an additional thirty days, if notice of such an extension is filed with the court in writing within the original thirty day time period.<sup>43</sup> Attorneys who practice in the civil law will recognize these amendments as cognates of the provisions used in the trial rules.

## II. EX PARTE COMMUNICATION BETWEEN LAWYERS AND JUDGES

The lawyer's role as advocate has definite limits and can have an effect on the way in which issues of substantive law are presented to tribunals.<sup>44</sup> These limitations on advocacy are matters falling directly under the heading of professional regulation. During the relevant period, two matters decided by the Indiana Supreme Court illustrate one of the frustrating issues advocates face: communication between an opponent lawyer and the judge presiding over the contested matter.<sup>45</sup> Of course, there are circumstances in the law when *ex parte*

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37. *See id.*

38. *Compare* IND. TRIAL RULE 8(B) (1998).

39. *See* ADMIS. DISC. R. 23, § 14.

40. *See id.* § 14(c).

41. *See* T.R. 55(B).

42. *See* ADMIS. DISC. R. 23, § 14(a).

43. *See id.*

44. *See* IND. PROFESSIONAL CONDUCT RULE 3.3 (1998). For example, Rule 3.3 requires a lawyer to disclose facts to a tribunal when necessary to prevent a crime or fraud on the court. The same rule requires a lawyer to advise the court of controlling authority in a controversy whether or not that authority is favorable to the client. *See id.*

45. *See* PROF. COND. R. 3.5. This rule provides "A lawyer shall not; (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; (b) communicate *ex parte* with such a person except as permitted by law; or (c) engage in conduct intended to disrupt a tribunal." *Id.*



communication between the judge and a lawyer are permitted.<sup>46</sup> These allowed *ex parte* communications usually involve issues where time is of the essence, and unless immediate judicial intervention is given, some irreparable harm may result to one of the litigants.<sup>47</sup> It is also essential in such situations that the party against whom relief is sought be given notice when practicable.<sup>48</sup> As temporary restraining orders law has developed, the adequacy of notice to an opponent is a fact that should be carefully scrutinized by the presiding judge before rendering a decision affecting an absent party's interests.<sup>49</sup> Cases finding *ex parte* communications violations can be classified into two categories: cases in which the *ex parte* communication is prohibited generally,<sup>50</sup> and cases in which the *ex parte* communication may be otherwise proper, but it is done in such a way to deprive the opposing party of their opportunity to be heard, while also providing the presiding judge with inadequate or false information, resulting in a flawed or needlessly injurious decision.<sup>51</sup>

Two rulings issued during the survey period highlight this second category of improper communication. First, in *In re Warrum*<sup>52</sup> the respondent, an Evansville lawyer, represented a woman who was divorced from her husband in Utah in 1985. The Utah court entered orders regarding custody, visitation and child support, providing that the father, a Utah resident, was ordered to pay child support of fifty dollars per month. He remained in Utah and the mother and child moved to Evansville. After the father failed to pay support, the mother received Assistance for Dependent Children payments and enlisted the Vanderburgh County Prosecutor's office to assist in collecting the unpaid support payments. In 1991, she petitioned the Utah trial court for an increase in the fifty-dollar per month child support award. In 1992, while the Utah matter was pending, the mother hired the respondent to secure additional support and restrict her ex-husband's visitation with the child.<sup>53</sup>

The respondent filed a complaint in the Vanderburgh Superior Court seeking orders on child support, child custody and visitation "or a modification thereof."<sup>54</sup> The complaint did not mention the Utah case or any of the orders from the Utah court governing custody, visitation, and child support. It likewise failed to mention that the Utah court was considering a modification at the time

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46. One of the best known examples is the application for a temporary restraining order under Trial Rule 65(B).

47. *See id.*

48. *See id.*

49. *See id.*

50. *See In re Terry*, 394 N.E.2d 94 (Ind. 1979) (finding attorney contact with prospective jurors violates *ex parte* rules).

51. *See In re LaCava*, 615 N.E.2d 93 (Ind. 1993) (finding attorney contacted physician member of medical review panel in medical malpractice action and influenced physician's determination before panel officially rendered decision).

52. 724 N.E.2d 1097 (Ind. 2000).

53. *See id.* at 1098.

54. *Id.*



the Indiana action was filed. Although the respondent knew of the Utah decree and orders, he took no action to familiarize himself with the details or status of the Utah case.<sup>55</sup>

When the father learned of the Indiana action, he contacted the respondent by phone and provided information about his employment and income. The father's Utah lawyer also contacted the respondent inquiring as to why there was an Indiana proceeding. The respondent did not reply, and when the Indiana case came to a hearing, the respondent and the mother appeared but the father did not. The respondent did not mention to the Vanderburgh County judge the existence of the Utah case or its status, and, as a result, the Indiana court adopted the respondent's proposed entry computed in accordance with Indiana's child support guidelines. The Indiana order commanded the father to pay \$77.40 per week for the child and restricted his visitation rights to exclusively supervised visits with his child. At that point, the father had two judgments governing child support and visitation with his child.<sup>56</sup>

No one in Indiana notified the Utah authorities about the Indiana decree, and the father continued to pay his fifty dollar per month child support in accord with the prior Utah order. As a result, the father began to accumulate a child support arrearage under the Indiana order. Once the Vanderburgh County Prosecutor's office learned of the Indiana order, it intercepted at least three of the father's federal income tax refund checks to satisfy the Indiana arrearage. The father complained to Utah authorities that he was in compliance with the Utah order and that Indiana authorities were dunning him for additional amounts beyond those he was ordered to pay. An investigation began in both Utah and Indiana with Utah officials inquiring into why the Indiana order had been issued when there had been no change in jurisdiction. Indiana authorities questioned why the Utah support award was so low. As a result of the investigation, the Governor's offices from each state, a United States Senator, and Indiana's Family and Social Services Administration got involved in a dispute over jurisdiction and the accurate amount of child support due. Officials from both states met in Chicago for an unsuccessful mediation session in which both sides claimed the right to govern the dispute. In the end, the Utah court modified its order increasing the amount of support, while Indiana authorities still claimed that a valid Indiana arrearage existed. The Vanderburgh County Prosecutor's office eventually moved to dismiss the Indiana judgment.<sup>57</sup>

In imposing a public reprimand on the respondent, the Indiana Supreme Court described the problems that cascaded from the respondent's failure to simply and clearly inform the court in Vanderburgh County of the Utah proceedings governing the divorce.

The respondent's unfortunate failure to disclose the Utah decree to the Indiana court was completely contrary to the letter and spirit of Indiana's

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55. *See id.*

56. *See id.* at 1098-99.

57. *See id.* at 1099.



Uniform Child Custody Jurisdiction Law, which was to “[a]void litigation of custody decisions of other states and this state so far as feasible,” and to “[f]acilitate the enforcement of custody decrees of other states; and [foster] mutual assistance between the courts of this state and those of other states concerned with the same child.” That the respondent’s actions so thoroughly frustrated the purpose of the UCCJL, wasted judicial resources, and led to an interstate conflict clearly demonstrates that he engaged in conduct prejudicial to the administration of justice. Accordingly, we find that the respondent violated Prof.Cond.R. 8.4(d).

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The evidence clearly and convincingly demonstrates that the respondent knew of the Utah decree at the time he litigated the Indiana case, but neglected to advise the Indiana court of it or its terms. By that failure, the respondent deprived the Indiana judge of the opportunity to apply the provisions set forth in Indiana’s UCCJL, cause unnecessary litigation in this state, and set the stage for an interstate conflict ultimately consuming the resources of high state officials. Because of his insult to the administration of justice and its significant consequences in this case, we conclude that a public reprimand is appropriate.<sup>58</sup>

In another domestic relations matter, a trial judge agreed to an admonition by the Indiana Commission on Judicial Qualifications for his part in a case involving *ex parte* communications. In the *Public Admonition of the Honorable Fredrick R. Spencer, Madison Circuit Court*,<sup>59</sup> the judge presided over some post-dissolution wrangling involving a foreign divorce decree.

In *Spencer*, the mother and father of two children were divorced in Texas with the father being awarded custody of the children. The father eventually moved to Florida and the mother moved to Indiana. In June 1996, the mother filed an emergency petition for custody in a Madison Superior Court with Judge Brinkman presiding. Judge Brinkman initially granted the petition and set the case for hearing. He eventually deferred jurisdiction to Florida who had, by then, asserted jurisdiction over the decree under the Uniform Child Custody Jurisdiction Act (UCCJA). During a July 1998 visit to Florida, the mother and father executed a joint stipulation of permanent custody and visitation. Under that agreement, the mother had summer visitation with the children.<sup>60</sup>

Thereafter, she brought the children back to Indiana and enrolled them in school without the father’s permission. In August of that year, a Florida judge

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58. *Id.* (internal citation omitted).

59. *Public Admonition of the Honorable Fredrick R. Spencer, Madison Circuit Court*, slip op. (Dec. 28, 1999). This ruling is public, but not published in the West’s Reporter Series. Copies can be obtained from the Indiana Commission on Judicial Qualifications.

60. *See id.* at 1-2.



awarded the father permanent custody and gave the wife summer visitation. The mother then filed another emergency petition for change of custody in Judge Spencer's court claiming that the stipulation the mother signed in Florida was made under duress. Unlike the petition in *Warrum*, this petition fully set out the steps by which Florida had accepted jurisdiction and that the children were enrolled in school and lived in Madison County. No real emergency was alleged and Judge Spencer granted relief to the mother without giving the father an opportunity to be heard. Upon learning of the Madison Circuit Court action, the Florida judge attempted to reach Judge Spencer by telephone on more than one occasion. Judge Spencer, however, did not return the messages as he had a duty to do under the UCCJA.<sup>61</sup>

The father, on the strength of the Florida order, came to Indiana, removed the children and returned to Florida with them. The mother, on the strength of the Madison Circuit Court order, went to Florida and surreptitiously took the children from the father's residence and brought them back to Indiana. In December, a hearing was held in the Madison Circuit Court in which Judge Spencer determined he had jurisdiction over the matter despite all the indications of Florida's interest and jurisdiction. It was not until September 1999 when the Indiana Court of Appeals ruled that the Judge erred in not granting the father's motion to dismiss on jurisdictional grounds that the ordeal was resolved.<sup>62</sup>

In the agreed admonition, the Commission relied directly on the dangers associated with receiving *ex parte* information and relying thereon to grant relief.

The Commission admonishes Judge Spencer for entertaining and granting an *ex parte* petition for change of custody, without notice to the custodial father. Although the petition purported to present an emergency not requiring notice and hearing, in the Commission's view the petition merely reflected a standard dispute between divorced parents, one desirous of obtaining a change in the custodial relationship. Therefore, it should have been treated as any civil pleading, where the filing would be noticed and the parties would be given an opportunity to be heard. Judge Spencer is admonished further for failing to communicate with the Florida judge who had assumed jurisdiction and had issued an order granting custody to the father, and whose office attempted to contact Judge Spencer. This communication is required under the Uniform Child Custody Jurisdiction Act, and is a requirement designed to help prevent the very circumstances which occurred here, where a request was made to an Indiana court to grant relief when another state was exercising jurisdiction. Judge Spencer's failure to acknowledge Florida's claim of jurisdiction is exacerbated by his knowledge that, a year earlier, the mother had filed a similar "emergency" petition in another Madison County Court, with Judge Brinkman presiding, and that Judge Brinkman ultimately had deferred

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61. See *id.* at 2.

62. See *id.* (citing *Rios v. Rios*, 717 N.E.2d 187 (Ind. Ct. App. 1999)).



jurisdiction to Florida.<sup>63</sup>

Although both cited cases involve foreign divorce decrees, child support and custody awards, they highlight a problem with *ex parte* communication and relief that go beyond the facts of the recited decisions. The presiding judge *must* rely on the information provided by the lawyer in order to fashion a remedy that is appropriate on the facts of a given case.<sup>64</sup> In *Warrum*, the lawyer was found to have violated Indiana Professional Conduct Rule 8.4(d) which governs conduct prejudicial to the administration of justice.<sup>65</sup> In *Spencer*, the judge was admonished for engaging in conduct contrary to Canon 3(B)(8) of the Code of Judicial Conduct that requires a judge to accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.<sup>66</sup> The rule goes on to state, with limited exceptions, that "[a] judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties, concerning a pending or impending proceeding."<sup>67</sup> Furthermore, the Commentary to the Canon provides:

Certain *ex parte* communication is approved by Section 3B(8) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage *ex parte* communication and allow it only if the criteria stated in Section 3B(8) are clearly met. A judge must disclose to all parties all *ex parte* communications . . . regarding a proceeding pending or impending before the judge.<sup>68</sup>

The cases decided during the survey period illustrate the unique and delicately balanced position judges have in our system of adjudication. As arbiters of disputes they are limited under the Code of Judicial Conduct to consider only the evidence that comes before them in rendering a fair and impartial decision.<sup>69</sup> As public officials, judges are community leaders and are expected to take an active involvement in law related issues important to the community they serve.<sup>70</sup> The problem with the *ex parte* communications at issue

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63. *Id.* at 11.

64. *See In re Mullins*, 649 N.E.2d 1024 (Ind. 1995). The respondent lawyer initiated guardianship proceedings in one county without advising the judge that a similar parallel proceeding had been pending for some months in an adjoining county. *See id.*

65. *See* IND. PROFESSIONAL CONDUCT RULE 8.4(d). This rule provides: "It is professional misconduct for a lawyer to . . . engage in conduct prejudicial to the administration of justice." *Id.*

66. *See* IND. JUDICIAL CONDUCT CANON 3(B)(8).

67. *Id.*

68. *Id.* cmt. 3.

69. *See* JUD. CANON 2. The canon provides that, "A judge shall respect and comply with the law and shall act at all times in manner that promotes public confidence in the integrity and impartiality of the judiciary." *Id.*

70. *See* JUD. CANON 2(D). This section of the canon permits a judge to "lend the prestige of



in the survey cases may not be common, but it certainly is nothing new. The court of appeals was forced to comment on the dilemma faced by a judge who, doing otherwise meritorious work for the community, was placed in an untenable position by hearing evidence from a prospective litigant outside the presence of the potential opponent. In *Stivers v. Knox County Department of Public Welfare*,<sup>71</sup> the court of appeals observed:

Although there is evidence which reflects that the juvenile court judge's participation in the meetings was passive, in that he made no recommendations or was limited in discussions, we are of the opinion that his presence at such times was not permissible if he intends to be the judge on the case under discussion.

At the worst, this situation is a classic example of an *ex parte* communication contemplated and prohibited by Canon 3(A)(4); a prospective litigant discussing potential litigation as well as the evidence, admissible or inadmissible, in support of that litigation without the presence of the other party and all done in the presence of the judge who will preside over that litigation when it is filed constitutes an intolerable situation. At the best, which is still unacceptable, the situation is one which has every appearance of impropriety and detracts strongly from a manner which promotes the integrity and the impartiality of the judiciary.<sup>72</sup>

Such prohibitions against *ex parte* communications with a judge have a long history in the law. In the original 1908 Canons of the American Bar Association on which modern codes of professional behavior are based, Canon 3 provided, in part:

A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the Judge's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.<sup>73</sup>

Likewise, the 1908 Canons of Judicial Ethics contained a cognate provision in Judicial Canon 16 that provided:

A judge should discourage *ex parte* hearings of applications for injunctions and receiverships where the order may work detriment to

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the judge's office to advance the public interest in the administration of justice." *Id.*

71. 482 N.E.2d 748 (Ind. Ct. App. 1985).

72. *Id.* at 751.

73. CANONS OF PROFESSIONAL ETHICS OF THE ABA Canon 3 (1908).



absent parties; he should act upon such *ex parte* applications only where the necessity for quick action is clearly shown; if this be demonstrated, then he should endeavor to counteract the effect of the absence of opposing counsel by a scrupulous cross-examination and investigation as to the facts and the principles of law on which the application is based, granting relief only when fully satisfied that the law permits it and the emergency demands it. He should remember that an injunction is a limitation upon the freedom of action of defendants and should not be granted lightly or inadvisedly. One applying for such relief must sustain the burden of showing clearly its necessity and this burden is increased in the absence of the party whose freedom of action is sought to be restrained even though only temporarily.<sup>74</sup>

These constraints on seeking *ex parte* have been universally accepted by every state's bar and remain a regular subject for ethics opinions around the country.<sup>75</sup> An example includes:

[A lawyer in a divorce case may] seek an *ex parte* order to seal a safe deposit box so that items will not be removed pending a hearing. . . . [I]n an *ex parte* proceeding the lawyers shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision whether or not the facts are adverse.<sup>76</sup>

These were the mistakes that led to the respondent lawyer's discipline in *Warrum*.<sup>77</sup> When seeking relief without the presence of the other party, the lawyer must give the presiding judge not only complete information about the case he represents, but also information about the opponent or the opponent's counsel and an indication that they have been served with the necessary papers.<sup>78</sup> Even if such service is unsuccessful, it is incumbent on the lawyer to inform the judge of the efforts made to serve the opposing party with notice.<sup>79</sup> Conversely, the judge must inquire about service on the opposing side and satisfy himself that the relief sought is appropriate and warranted.<sup>80</sup> As the *Warrum* and *Spencer* matters show, profound consequences can flow from the pursuit of *ex parte* relief improperly sought and improvidently granted.

### III. ETHICS AND THE PROSECUTOR'S FUNCTION

During this period, the Indiana Supreme Court once again addressed an important ethics issue in relation to the execution of the duties of a prosecuting

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74. CANONS OF JUDICIAL ETHICS OF THE ABA Canon 16 (1908).

75. See generally ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 61:801.

76. Pennsylvania State Bar Association, Ethics opinion 96-153, Nov. 12, 1996.

77. See *In re Warrum*, 724 N.E.2d 1097 (Ind. 2000).

78. See *id.* at 1099-1100; see also IND. PROFESSIONAL CONDUCT RULE 3.3.

79. See PROF. COND. R. 3.3.

80. See *id.*; see also IND. TRIAL RULE 65(B) (governing the standards for obtaining a temporary restraining order without the presence of the opposing party).



attorney and his deputies. In the case of *Johnson v. State*,<sup>81</sup> the court accepted an interlocutory appeal from the Marion Superior Court to address the issue of the limits on a prosecutor's discretion to charge an individual with crimes.<sup>82</sup>

In *Johnson*, the defendant was an adolescent guidance specialist working in alcohol and drug treatment at Fairbanks Hospital in Indianapolis. During a routine room check in 1998, Johnson allegedly had intercourse with a sixteen year old detainee at the facility. About two weeks later, Johnson was charged with sexual misconduct, a class "D" felony. On September 8, 1998, the trial court required the State to give thirty days notice of its intent to use evidence of prior misconduct by Johnson. The State waited until April 23, 1999 when they filed their final witness and exhibit list to identify the Rule 404(b) evidence as four other female Fairbanks Hospital patients.<sup>83</sup>

Johnson filed a motion *in limine* and was successful in getting the testimony of the other four women excluded due to the late identification by the State. The prosecutor then responded with a motion to dismiss the charge, which the trial court also granted. Johnson resisted the dismissal and objected in writing, stating that he was ready for trial and that the State's dismissal should be with prejudice. On May 5, 1999, the State refilled the original charge and added ten more counts. Johnson moved to dismiss all of the charges, and after the trial court denied his motion, took an interlocutory appeal. The trial court was affirmed by memorandum decision by the court of appeals.<sup>84</sup>

In accepting the appeal in *Johnson*, the supreme court faced a situation that was similar, but not identical, to the case of *Davenport v. State*.<sup>85</sup> In *Davenport*, the criminal defendant was charged originally with murder. Four days before his trial, the State filed a motion to amend the original charge to include charges of felony murder, attempted robbery, and auto theft. The trial court denied the motion. The next day, the State dismissed the murder charge and refiled it along with the three new charges. The defendant filed a motion to dismiss and, after a hearing, the trial court denied the motion and allowed Davenport's case to proceed to trial.<sup>86</sup> Davenport was convicted of all the crimes charged, but on transfer, the supreme court reversed all but the original murder charge. In holding that the prosecutor abused his discretion in refiling the charges in another court, the supreme court said:

While courts have allowed the State significant latitude in filing a second information, the State cannot go so far as to abuse its power and prejudice a defendant's substantial rights. In the present case, the State received an adverse ruling in the original trial court on its motion to amend the information. As a result, defendant had to defend against one

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81. 740 N.E.2d 118 (Ind. 2001).

82. See *id.* at 119.

83. See *id.* at 119-20.

84. See *id.* at 120.

85. 689 N.E.2d 1226 (Ind. 1997).

86. See *id.* at 1228-30.



count of murder. In response, the State dismissed the case and filed a second information which contained four counts: the original murder count plus the felony murder, attempted robbery, and auto theft counts. Then, for no apparent reason other than because the State knew that the court had already ruled that the State could not include those additional three counts in the information, the State moved for and was granted transfer to a different court. By doing so, the State not only crossed over the boundary of fair play but also prejudiced the substantial rights of the defendant. Because of a sleight of hand, the State was able to escape the ruling of the original court and pursue the case on the charges the State had sought to add belatedly. This is significantly different than what has been permitted in the past. Therefore, the trial court erred in denying defendant's motion to dismiss the felony murder, attempted robbery, and auto theft charges.<sup>87</sup>

In the end, the supreme court affirmed Davenport's conviction of the single murder charge with which he was originally charged, but reversed the trial court's decision to allow the case to go to trial on the additional charges filed on the eve of trial.<sup>88</sup>

In *Johnson*, an additional issue was present that was not an issue in the *Davenport* decision, filing additional charges in an apparent retaliation for the prior motion *in limine*.<sup>89</sup> With *Davenport* controlling, the supreme court reversed the memorandum affirmation from the court of appeals and held that the latitude permitted prosecutors in making charging decisions had limits and, like *Davenport*, the State in the *Johnson* case had exceeded those boundaries.

Although this case arose from the exclusion of evidence rather than denial of permission to add charges, the reasoning of *Davenport* is pertinent. In each case, the State sought to take some action (i.e. to add charges or to offer evidence of other acts of misconduct) that would require the defendant to revise his defense strategy at the eleventh hour. In each case, the trial court concluded that the State did not have a good reason for the delay or lack of notice. In each case, the court properly forbade the action as taken too late. In each case, the prosecutor sought to dodge the adverse ruling via dismissal and refiling. The equities weigh even more heavily in *Johnson's* favor than in either *Davenport* or *Klein*. By refiling, the State attempted not only to evade the court's ruling and get a second shot at offering 404(b) evidence, but also to subject *Johnson* to ten additional charges. If the State may circumvent an adverse evidentiary ruling by simply dismissing and refiling the original charge, and also "punish" the defendant for a successful procedural challenge by piling on additional charges, defendants will as a practical matter be unable to avail themselves of legitimate procedural

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87. *Id.* at 1230.

88. *See id.* at 1233.

89. *See Johnson v. State*, 740 N.E.2d 118, 121 (Ind. 2001).



rights. . . . Based on the circumstances presented, we conclude that the State exceeded the boundaries of fair play. The prosecutor impermissibly impinged the defendant's exercise of his substantial procedural rights by dismissing and refileing to evade an adverse trial court ruling and, in the process, piling on additional charges that were unjustified by changed circumstances. Therefore, the trial court abused its discretion when it denied in total Johnson's motion to dismiss the eleven-count information.<sup>90</sup>

The supreme court then used its equitable powers to return the parties to the position they were in *status quo ante* and returned the case to the trial court so that it could proceed on the original single charge of sexual misconduct.<sup>91</sup> In a footnote, the court acknowledged the holding from *Davenport* that substantial rights of a criminal defendant are not *per se* prejudiced when the State dismisses an information in order to avoid an adverse evidentiary ruling and then refiles an information for the same offense.<sup>92</sup> The court quickly followed up by adding that the question of substantial prejudice is a fact-sensitive inquiry and is not readily amenable to a bright-line test.<sup>93</sup> Viewed another way, this could be a signal to astute prosecutors and judges that the court of appeals and supreme court are ready to revisit this subject in future cases and review very carefully how these fact-sensitive inquiries are being handled.

*Johnson* is at least the third case in eighteen months in which the supreme court has published a decision critical of the State's handling of evidentiary matters either on the eve of or during trial. In the late summer of 1999, the court handed down two decisions criticizing prosecutors for their handling of *Brady*<sup>94</sup> material. In the cases, of *Williams v. State*<sup>95</sup> and *Goodner v. State*,<sup>96</sup> the supreme court criticized prosecutors for last minute disclosures of information that could have been beneficial to the defense of a criminal defendant. In *Goodner*, a key prosecution witness received a favorable deal on his own criminal case in exchange for his favorable testimony for the State at trial. The State did not disclose the arrangement to the defense until the witness had left the witness stand. When questioned about the arrangement during the defense's case-in-chief, the witness initially denied the favorable treatment until re-direct examination by the State.<sup>97</sup> The court noted, however, that the evidentiary issue was one that they had dealt with repeatedly and considered stronger action if problems continued.

There may be a valid explanation for the sequence of events at

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90. *Id.*

91. *See id.*

92. *See id.* at 120 n.3 (citing *Davenport*, 689 N.E.2d at 1229).

93. *See id.*

94. *Brady v. Maryland*, 373 U.S. 83 (1963).

95. 714 N.E.2d 644 (Ind. 1999), *cert. denied*, 528 U.S. 1170 (2000).

96. 714 N.E.2d 638 (Ind. 1999).

97. *See id.* at 640.



Goodner's trial, but none is apparent, and none was offered in the trial court. This conduct appears to be a recurring scenario. We cannot continue to tolerate late inning surprises later justified in the name of harmless error. Continued abuses of this sort may require a prophylactic rule requiring reversal. In the meantime, there are other sanctions for prosecutorial misconduct. The Indiana Rules of Professional Conduct require a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." Rule 8.4(d) also states that it is misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." Members of the bar and the trial bench should remember their obligation to report such misconduct to the appropriate authorities.<sup>98</sup>

It should be clear, then, that the Indiana Supreme Court is continuously reviewing the matters that come before it with an eye towards not only the conduct of the case below, but also the conduct of the lawyers and judges who represented the parties. As the quoted text from *Goodner* makes clear, the Rules of Professional Conduct and other ethical standards remain at the ready when the supreme court examines the cases on its docket.<sup>99</sup> Although this same analysis is not present on the face of the opinion in *Johnson*,<sup>100</sup> the language used in the decision reveals that the professional conduct of the prosecutors involved in the case was at the heart of the decision.<sup>101</sup> With *Williams*, *Goodner* and now *Johnson* in mind, lawyers representing both the State and the defense in criminal cases should have an unmistakable signal that ethics is as much a part of the criminal justice process as are the facts in the case at bar.

#### CONCLUSION

As noted at the outset, the pervasive quality of professional ethics has a substantial impact on the way in which issues of substantive law are handled. The cases cited herein should serve to illustrate that the advocacy battleground does, indeed, have very definable limits. Lawyers exceeding those bounds, even when it is within their power to do so, proceed at their peril. The cases should also serve to point out that unprofessional behavior is not simply a matter affecting the individual lawyer or judge, but it can have a determinative effect on the substantive underlying case being adjudicated. This year's cases, coupled with the amendments to the rules governing professional discipline, signal a strong effort on the part of the Indiana Supreme Court to maintain very high standards of professional responsibility for all members of the Indiana bar.

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98. *Id.* at 642-43 (citations omitted).

99. *See id.*

100. *Johnson v. State*, 740 N.E.2d 118 (Ind. 2001).

101. *See id.* at 121.



## APPENDIX "A"

## AMENDMENTS TO ADMISSION AND DISCIPLINE 23

EFFECTIVE JANUARY 1, 2001

## Rule 23. Disciplinary Commission and Proceedings

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**Section 8. Powers and Duties of the Disciplinary Commission**

In addition to the powers and duties set forth in this Rule, the Commission shall have the power and duty to:

(a) appoint with the approval of the Supreme Court an Executive Secretary of the Commission who shall be a member of the Bar of this State and who shall serve at the pleasure of the Commission;

(b) prepare and furnish a form of request for investigation to each person who claims that an attorney is guilty of misconduct and to each Bar Association in this State for distribution to such persons;

(c) supervise the investigation of claims of misconduct;

(d) issue subpoenas, including subpoenas duces tecum; the failure to obey such subpoena ~~shall~~ may be punished as contempt of this Court; or, in the case of an attorney under investigation, shall subject the attorney to suspension under the procedures set forth in subsection 10(f) of this Rule;

(e) do all things necessary and proper to carry out its powers and duties under these Rules;

(f) the right to bring an action in the Supreme Court to enjoin or restrain the unauthorized practice of law.

**Section 9. Powers and Duties of the Executive Secretary**

In addition to the powers and duties set forth in this Rule, the Executive Secretary shall have the power and duty to:

(a) administer the Commission's work;

(b) appoint, with the approval of the Commission, such staff as may be necessary to assist the Commission to carry out its powers and duties under this Rule;



(c) supervise and direct the work of the Commission's staff;

(d) appoint and assign duties to investigators;

(e) supervise the maintenance of the Commission's records;

(f) issue subpoenas in the name of the Commission, including subpoenas duces tecum. The failure to obey such a subpoena shall be punished as a contempt of this Court; or, in the case of an attorney under investigation, shall subject the attorney to suspension under the procedures set forth in subsection 10(f) of this Rule;

(g) enforce the collection of the registration fee provided in Section 15 against delinquent members of the Bar;

(h) notwithstanding Section 22, cooperate with the attorney disciplinary enforcement agencies of other jurisdictions, including, upon written request, the release of any documents or records that are in the control of the Executive Secretary to the chief executive of an attorney disciplinary enforcement agency in any jurisdiction in which an Indiana attorney is also admitted; and

(i) do all things necessary and proper to carry out the Executive Secretary's duties and powers under this Rule.

### **Section 10. Investigatory Procedures**

(a) Upon receipt of a written, verified claim of misconduct (hereinafter referred to as "the grievance"), from a member of the public, a member of this bar, a member of the Commission, or a Bar Association (hereinafter referred to as "the grievant") and completion of such preliminary investigation as may be deemed appropriate, the Executive Secretary shall:

(1) Dismiss the claim, with the approval of the Commission, if the Executive Secretary determines that it raises no substantial question of misconduct; or

(2) If the Executive Secretary determines that it does raise a substantial question of misconduct, send a copy of the grievance by certified mail to the attorney against whom the grievance is filed (hereinafter referred to as "the respondent") and shall demand a written response. The respondent shall respond within twenty (20) days, or within such additional time as the Executive Secretary may allow, after the respondent receives a copy of the grievance. In the event of a dismissal as provided herein, the person filing the grievance and the respondent shall be given written notice of the Executive Secretary's determination. In the event of a determination that a substantial question exists, the matter shall proceed to subsection (b) hereinafter.



(b) Thereafter, if the Executive Secretary, upon consideration of the grievance, any response from the respondent, and any preliminary investigation, determines there is a reasonable cause to believe that the respondent is guilty of misconduct the grievance shall be docketed and investigated. If the Executive Secretary determines that no such reasonable cause exists, the grievance shall be dismissed with the approval of the Commission. In either event, the person filing the grievance (hereinafter referred to as "the grievant") and the respondent shall be given written notice of the Executive Secretary's determination.

(c) If the grievance is docketed for investigation, the Executive Secretary shall conduct an investigation of the grievance. Upon completion of the investigation the Executive Secretary shall promptly make a report of the investigation and a recommendation to the Commission at its next meeting.

(d) In conducting an investigation of any grievance, or in considering the same, the Executive Secretary or the Commission shall not be limited to an investigation or consideration of only matters set forth in the grievance, but shall be permitted to inquire into the professional conduct of the attorney generally. In the event that the Executive Secretary or the Commission should consider any charges of misconduct against an attorney not contained in the grievance, the Executive Secretary shall notify the attorney of the additional charges under consideration, and the attorney shall make a written response to the additional charges under consideration within twenty (20) days after the receipt of such notification, or within such additional time as the Executive Secretary shall allow.

Any additional charges of misconduct against an attorney, after such notice has been given by the Executive Secretary and the attorney has had an opportunity to reply thereto, may be the subject of a count of any complaint filed against the attorney pursuant to Sections 11 and 12 of this Rule.

(e) It shall be the duty of every attorney against whom a grievance is filed under this Section to cooperate with the Commission's investigation, accept service, comply with the provisions of these rules, and when notice is given by registered or certified mail, claim the same in a timely manner either personally or through an authorized agent. Every attorney is obligated under the terms of Admission and Discipline Rule 2 to notify the Clerk of the Supreme Court of any change of address or name within thirty (30) days of such change, and a failure to file the same shall be a waiver of notice involving licenses as attorneys or disciplinary matters.

(f) An attorney who is the subject of an investigation by the Disciplinary Commission may be suspended from the practice of law upon a finding that the attorney has failed to cooperate with the investigation.

(1) Such a finding may be based upon the attorney's failure to submit a written response to pending allegations of professional



misconduct, to accept certified mail from the Disciplinary Commission that is sent to the attorney's official address of record with the Clerk and that requires a written response under this Rule, or to comply with any lawful demand for information made by the Commission or its Executive Secretary in connection with any investigation, including failure to comply with a subpoena issued pursuant to sections 8(d) and 9(f) or unexcused failure to appear at any hearing on the matter under investigation.

(2) Upon the filing with this Court of a petition authorized by the Commission, the Court shall issue an order directing the attorney to respond within ten (10) days of service of the order and show cause why the attorney should not be immediately suspended for failure to cooperate with the disciplinary process. Service upon the attorney shall be made pursuant to sections 12(g) and (h). The suspension shall be ordered upon this Court's finding that the attorney has failed to cooperate, as outlined in subsection (f)(1), above. An attorney suspended from practice under this subsection shall comply with the requirements of sections 26(b) and (c) of this rule.

(3) Such suspension shall continue until such time as (a) the Executive Secretary certifies to the Court that the attorney has cooperated with the investigation; (b) the investigation or any related disciplinary proceeding that may arise from the investigation is disposed; or (c) until further order of the Court.

(4) On motion by the Commission and order of the Court, suspension that lasts for more than six (6) months may be converted into indefinite suspension.

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### **Section 11.1 Summary Suspensions**

(a) Upon finding that an attorney has been found guilty of a crime punishable as a felony, the Supreme Court may suspend such attorney from the practice of law pending further order of the Court or final determination of any resulting disciplinary proceeding.

(1) The judge of any court in this state in which an attorney is found guilty of a crime shall, within ten (10) days after the finding of guilt, transmit a certified copy of proof of the finding of guilt to the Executive Secretary of the Indiana Supreme Court Disciplinary Commission.

(2) An attorney licensed to practice law in the state of Indiana who is found guilty of a crime in any state or of a crime under the laws of the United States shall, within ten (10) days after such finding of guilt, transmit a certified copy of the finding of guilt to the Executive



Secretary of the Indiana Supreme Court Disciplinary Commission.

(3) Upon receipt of information indicating that an attorney has been found guilty of a crime punishable as a felony under the laws of any state or of the United States, the Executive Secretary shall verify the information, and, in addition to any other proceeding initiated pursuant to this Rule, shall file with the Supreme Court a Notice of Finding of Guilt and Request for Suspension, and shall forward notice to the attorney by certified mail. The attorney shall have fifteen (15) days thereafter to file any response to the request for suspension. Thereafter, the Supreme Court may issue an order of suspension upon notice of finding of guilt which order shall be effective until further order of the Court.

~~(b) If after consideration pursuant to Section 11(b), the Commission determines there is reasonable cause to believe the respondent is guilty of misconduct which, if proven, would warrant suspension pending prosecution, it shall file a motion to that effect with this Court, and this Court shall so advise the hearing officer or officers.~~

~~—(1) If there has been a determination of reasonable cause as set forth under Section 11.1(b) above, and if the complaint states facts constituting such reasonable cause, the hearing officer or officers may, upon motion of the Disciplinary Commission, issue a rule against the respondent to show cause why he or she should not be suspended pending final determination of the cause and fixing a time and place certain for hearing thereon, which shall be not less than fifteen (15) days after service of notice thereof, if by personal service, and not less than twenty (20) days after mailing, if by certified or registered mail. Procedure at the hearing upon such rule to show cause shall be the same as provided herein for hearing upon the complaint and answer, except the burden of proof shall be upon the respondent. If the respondent, in the opinion of the hearing officer or officers shall fail to sustain such burden of proof, the hearing officer or officers shall submit to this Court a written recommendation whether or not the respondent be suspended pending final determination of the cause.~~

~~(2) Upon receipt of written recommendation for suspension, pending final determination of the cause, this Court may forthwith enter an order of suspension thereon. Respondent shall have fifteen (15) days thereafter to petition this Court for a review and a dissolution of such order.~~

If it appears to the Disciplinary Commission upon the affirmative vote of two-thirds (2/3) of its membership, that: (i) the continuation of the practice of law by an attorney during the pendency of a disciplinary investigation or proceeding may pose a substantial threat of harm to the public, clients, potential clients, or the administration of justice, and (ii) the alleged conduct, if true,



would subject the respondent to sanctions under this Rule, the Executive Secretary shall petition the Supreme Court for an order of interim suspension from the practice of law or imposition of temporary conditions of probation on the attorney.

(1) A petition to the Supreme Court for interim relief under this subsection shall set forth the specific acts and violations of the Rules of Professional Conduct submitted by the Commission as grounds for the relief requested. The petition shall be verified and may be supported by documents or affidavits. A copy of the petition, along with a notice to answer, shall be served by the Commission on the attorney in the same manner as provided in sections 12(g) and (h) of this rule. The Executive Secretary shall file a return on service, setting forth the method of service and the date on which the respondent was served with the petition and notice to answer. The attorney shall file an answer to the Commission's petition with the Supreme Court within fourteen (14) days of service. The answer shall be verified and may be supported by documents or affidavits. The attorney shall mail a copy of the answer to the Executive Secretary and file proof of mailing with the court.

(2) The failure of the respondent to answer the Commission's petition within the time granted by this rule for an answer shall constitute a waiver of the attorney's right to contest the petition, and the Supreme Court may enter an order of interim suspension or imposition of temporary conditions of probation in conformity with subsection (b)(5) either upon the record before it, or at the discretion of the Court, after a hearing ordered by the Court.

(3) Upon the filing of the respondent's answer and upon consideration of all of the pleadings, the Court may:

(i) order interim suspension or imposition of temporary conditions of probation upon the petition and answer in conformity with subsection (b)(5);

(ii) deny the petition upon the petition and answer; or

(iii) refer the matter to a hearing officer, who shall proceed consistent with the procedures set forth in subsection (b)(4).

(4) Upon referral to a hearing officer of an interim relief matter from the Supreme Court, the hearing officer shall hold a hearing thereon within thirty (30) days of the date of referral and render a report to the Court containing findings of fact and a recommendation within fourteen (14) days of the hearing. The Court shall thereafter act promptly on the hearing officer's report, findings and recommendation.



(5) The Supreme Court, upon the record before it or after receiving a hearing officer's report, shall enter an appropriate order. If the Court finds that the Commission has shown by a preponderance of the evidence that:

(i) the continuation of the practice of law by the respondent during the pendency of a disciplinary investigation or proceeding may pose a substantial threat of harm to the public, clients, potential clients, or the administration of justice; and

(ii) the conduct would subject the respondent to sanctions under this rule;

the Court shall grant the petition and enter an order of interim suspension or imposition of temporary conditions of probation. The order shall set forth an effective date and remain in effect until disposition of any related disciplinary proceeding or further order of the court.

(6) In the event the Court issues an order of interim relief pursuant to subsection (b)(5), the respondent may file a verified motion with the Supreme Court at any time for dissolution or amendment of the interim order by verified motion that sets forth specific facts demonstrating good cause. A copy of the motion shall be served on the Executive Secretary. Successive motions for dissolution or amendment of an interim order may be summarily dismissed by the Supreme Court to the extent they raise issues that were or with due diligence could have been raised in a prior motion. If the motion is in proper form, the Court may refer the matter to a hearing officer, who shall proceed consistent with the procedures set forth in subsection (b)(4).

(7) In the event a verified complaint for disciplinary action has not been filed by the time an order of interim relief is entered, the Disciplinary Commission shall file a formal complaint within sixty (60) days of the interim relief order. When a respondent is subject to an order of interim relief, the hearing officer shall conduct a final hearing of the underlying issues and report thereon to the Court without undue delay.

(8) An attorney suspended from practice under this section shall comply with the requirements of subsections 26(b) and (c) of this rule.

(c) Upon receipt of an order from a court pursuant to IC 31-16-12-8 or IC 31-14-12-5 stating finding that an attorney has been found to be delinquent in the payment of child support as a result of an intentional violation of an order for support, the Executive Secretary shall file with the Supreme Court a Notice of Intentional Violation of Support Order and Request for Suspension, and shall



forward notice to the attorney by certified mail. The attorney shall have fifteen (15) days thereafter to file any response to the request for suspension. Thereafter, the Supreme Court may issue an order of suspension. Such order shall be effective until further order of the Court.

### **Section 12. Prosecution of Grievances**

(a) If the Commission determines that there is reasonable cause to believe respondent is guilty of misconduct and the misconduct would not likely result in a sanction greater than a public reprimand if successfully prosecuted, and if the respondent and the Commission agree to an administrative resolution of the complaint, the Commission may resolve and dispose of minor misconduct by private administrative admonition without filing a verified complaint with the Court. Without limitation, misconduct shall not be regarded as minor if any of the following conditions exist:

- (1) The misconduct involves misappropriation of funds or property;
- (2) The misconduct resulted in or is likely to result in material prejudice (loss of money, legal rights or valuable property rights) to a client or other person;
- (3) The respondent has been publicly disciplined in the past three (3) years;
- (4) The misconduct involved is of the same nature as misconduct for which the respondent has been publicly or privately disciplined in the past five (5) years;
- (5) The misconduct includes dishonesty, misrepresentation, deceit, or fraud on the part of the respondent; or
- (6) The misconduct constitutes the commission of a felony under applicable law.

(b) An administrative admonition shall be issued in the form of a letter from the Executive Secretary to the respondent summarizing the facts and setting out the applicable violations of the Rules of Professional Conduct. A copy of the admonition letter shall first be sent to each Justice of the Supreme Court and to the Division of State Court Administration. The administrative admonition shall be final within thirty (30) days thereafter, unless set aside by the Court. If not set aside by the Court, the admonition shall be sent to the respondent, and notice of the fact that a respondent has received a private administrative admonition shall be given by the Executive Secretary to the grievant. The fact that an attorney has received a private administrative admonition shall be a public record, which shall be filed with the Clerk of this Court and shall be kept by the Executive Secretary.



(c) In the event the Commission determines that the misconduct, if proven, would warrant disciplinary action and should not be disposed of by way of an administrative admonition, the Executive Secretary shall prepare a verified complaint which sets forth the misconduct with which the respondent is charged and shall prosecute the case.

(d) The complaint shall be entitled "In the Matter of," naming the respondent. Six (6) copies shall be filed with this Court. The complaint may be verified on the basis of information and belief.

(e) Contemporaneously with the filing of the complaint, the Commission shall promptly prepare and furnish to the clerk as many copies of the complaint and summons as are necessary. The clerk shall examine, date, sign and affix his/her seal to the summons and thereupon issue and deliver the papers to the appropriate person for service. Separate or additional summons shall be issued by the clerk at any time upon proper request by the Commission.

(f) The summons shall contain:

(1) The name and address of the person on whom the service is to be effected;

(2) The Supreme Court cause number assigned to the case;

(3) The title of the case as shown by the complaint;

(4) The name, address, and telephone number of the Disciplinary Commission;

(5) The time within which this rule requires the person being served to respond, and a clear statement that in case of his or her failure to do so, the allegations in the complaint shall be taken as true.

The summons may also contain any additional information that will facilitate proper service.

~~(c)~~ (g) Upon the filing of such complaint, ~~a copy of the summons and complaint shall be served upon the respondent by delivering a copy of the complaint them~~ to the respondent personally or by sending a copy of the ~~complaint them~~ by registered or certified mail with return receipt requested and returned showing the receipt of the letter.

In the event the personal service or service by registered or certified mail cannot be obtained upon any respondent attorney, said summons and complaint shall be served on the Clerk of this Court as set forth below.

~~(f)~~ (h) Each attorney admitted to practice law in this State shall be deemed to have appointed the Clerk of this Court as his or her agent to receive service of any and all papers, processes or notices which may be called for by any provision of this rule. Such papers, process or notice may be served by filing the same with the Clerk of this Court as the agent for said attorney, together with an affidavit setting forth the facts necessitating this method of service. Upon receipt of such



papers, process or notice together with such affidavit, the Clerk of this Court shall immediately mail such papers, process or notice to such attorney at the attorney's address as shown upon the records of the Clerk of this Court, and the Clerk shall make an affidavit showing the mailing of such papers, process or notice to said attorney. Upon the completion of this procedure, said attorney shall be deemed to have been served with such papers, process or notice.

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#### **Section 14. Proceedings Before the Hearing Officer**

(a) The rules of pleading and practice in civil cases shall not apply. No motion to dismiss or dilatory motions shall be entertained. The case shall be heard on the complaint and an answer which ~~may shall~~ be filed by the respondent within thirty (30) days after ~~notice of the filing service~~ of the summons and complaint, or such additional time as may be allowed upon written application to the hearing officer that sets forth good cause. A written application for enlargement of time to answer shall be automatically allowed for an additional thirty (30) days from the original due date without a written order of the Hearing Officer. Any motion for automatic enlargement of time filed pursuant to this rule shall state the date when such answer is due and the date to which time is enlarged. The motion must be filed on or before the original due date or this provision shall be inapplicable. All subsequent motions shall be so designated and shall be granted by the hearing officer only for good cause shown. An answer, ~~if filed, may~~ shall assert any legal defense. Six (6) copies of such answer shall be filed with the Court. ~~An answer need not be filed, in which case the complaint shall be taken as denied.~~ A respondent may on a showing of good cause petition for a change of hearing officer within ten (10) days after the appointment of such hearing officer.

(b) The answer shall admit or controvert the averments set forth in the complaint by specifically denying designated averments or paragraphs or generally denying all averments except such designated averments or paragraphs as the respondent expressly admits. If the respondent lacks knowledge or information sufficient to form a belief as to the truth of an averment, he or she shall so state and his statement shall be considered a denial. If in good faith the respondent intends to deny only a part of an averment, he or she shall specify so much of it as is true and material and deny the remainder. All denials shall fairly meet the substance of the averments denied. Averments in a complaint are admitted when not denied in the answer. ~~An~~ The answer, if filed, may assert any legal defense. Six (6) copies of such answer shall be filed with the Court. ~~An answer need not be filed, in which case the complaint shall be taken as denied.~~ A respondent may on a showing of good cause petition for a change of hearing officer within ten (10) days after the appointment of such hearing officer.

(c) When a respondent has failed to answer a complaint as required by this section and that fact is made to appear by affidavit and an application for



judgment on the complaint, the allegations set forth in the complaint shall be taken as true. If a respondent who has failed to answer has appeared in the action, he or she (or, if appearing by counsel, his or her counsel) shall be served with written notice of the application for judgment on the complaint at least seven (7) days prior to the hearing on such application. Upon application for judgment on the complaint and in the absence of any answer by the respondent, the hearing officer shall take the facts alleged in the complaint as true and promptly tender a report to the Supreme Court in conformity with subsection (h). If a hearing officer has not been appointed by the time an application for judgment on the complaint is filed and no appearance has been filed by or on behalf of the respondent, the Supreme Court shall act directly on the application for judgment on the complaint.

~~(b)~~ (d) ~~Either the Executive Secretary or the respondent may file with the hearing officer a motion to take depositions or a motion to produce certain documents or records, setting forth the reasons why such depositions should be taken or such records should be produced. The hearing officer may permit the taking of such depositions or may require the production of documents or records under such terms and conditions as the hearing officer may deem proper. Discovery shall be available to the parties on~~ Such terms and conditions ~~shall that~~, as nearly as practicable, follow the Indiana Rules of Civil Procedure pertaining to discovery proceedings.

~~(c)~~ (e) At the discretion of the hearing officer, or upon the request of either party, a pre-hearing conference ~~may~~ shall be ordered for the purpose of obtaining admissions, narrowing the issues presented by the pleadings, requiring an exchange of the names and addresses of prospective witnesses and the general nature of their expected testimony, considering the necessity or desirability of amendments to the verified complaint and answer thereto, and such other matters as may aid in the disposition of the action.

~~(d)~~ (f) The grievant, the respondent, and the Commission shall be given not less than fifteen (15) days written notice of the hearing date. The respondent shall have the right to attend the hearing in person, to be represented by counsel, to cross-examine the witnesses testifying against him or her and to produce at the hearing and require the production of evidence and witnesses in his or her own behalf at the hearing, as in civil proceedings. All notices connected with processing of such complaint shall be issued only under the direction of the hearing officer or hearing officers, and no other court or judicial officer of this State shall have jurisdiction to issue any orders or processes in connection with a disciplinary complaint. Upon request of a party, the hearing officer may issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it or his or her attorney, who shall fill it in before service. The hearing officer may also authorize an attorney admitted to practice law in this state who has appeared for a party, as an officer of the court, to issue and sign such subpoena. Subpoenas for the attendance of witnesses and production of documentary evidence shall conform



to the provisions of Trial Rule 45. The hearing officer or officers shall have authority to enforce, quash or modify subpoenas upon proper application by an interested party or witness.

~~(e)~~ (g) The proceedings may be summary in form and shall be without the intervention of a jury and shall be reported.

~~(f)~~ (h) Within thirty (30) days after the conclusion of the hearing, the hearing officer shall determine whether misconduct has been proven by clear and convincing evidence and shall submit to the Supreme Court written findings of fact. Either party may request or the hearing officer at his or her own motion may make a recommendation concerning the disposition of the case and the discipline to be imposed. Such recommendation is not binding on the Supreme Court. A copy of said findings and any recommendations shall be served by the hearing officer on the respondent and the Executive Secretary of the Disciplinary Commission at the time of filing same with the Supreme Court.

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## **Section 17. Resignations and Admission of Misconduct**

(a) An attorney who is the subject of an investigation into, or a pending proceeding involving, allegations of misconduct may resign as a member of the bar of this Court, or may consent to discipline, but only by delivering to the Court an affidavit stating that the respondent desires to resign or to consent to discipline and that:

(1) The respondent's consent is freely and voluntarily rendered; he or she is not being subjected to coercion or duress; he or she is fully aware of the implications of submitting his or her consent;

(2) The respondent is aware that there is a presently pending investigation into, or proceeding involving, allegations that there exist grounds for his or her discipline the nature of which shall be specifically set forth;

(3) The respondent acknowledges that the material facts so alleged are true; and

(4) The respondent submits his or her resignation or consent because the respondent knows that if charges were predicated upon the matters under investigation, or if the proceeding were prosecuted, he or she could not successfully defend himself or herself.

(b) Upon receipt of the required affidavit, this Court ~~shall~~ may enter an order approving the resignation or imposing a disciplinary sanction on consent.



(c) Such order shall be a matter of public record. However, the affidavit required under the provisions of (a) above shall not be publicly disclosed or made available for use in any other proceeding except upon order of this Court.

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### **Section 17.1. Termination of Probation**

Unless otherwise provided in the order of probation, an attorney on probation at any time after 10 days prior to expiration of the period of probation may serve on the Executive Secretary (i) an affidavit showing successful compliance with all terms of probation, and (ii) an application for termination of probation. The Executive Secretary shall have ten (10) days after receipt to serve written objections on the attorney. Upon service of any objection the probation shall continue until further ordered by the Court. If no objection has been served, termination shall be effective ten (10) days (or thirteen (13) days if the application is served by mail) after receipt by the Executive Secretary.

### **Section 17.2. Revocation of Probation**

(a) Motion to Revoke. If the Executive Secretary receives information that an attorney on probation may have violated any condition of probation, the Executive Secretary may file a verified motion to revoke probation with the Court, setting forth specific facts in support of the motion. A motion for revocation of an attorney's probation shall not preclude the Commission from filing independent disciplinary charges based on the same conduct alleged in the motion.

(b) Response to Motion. Within ten (10) days after service of a petition under subparagraph (a), the attorney shall file an answer under penalties of perjury admitting or controverting each of the allegations contained in the revocation motion. A general denial shall not be allowed and, if filed, will be taken as a failure to answer. The attorney's failure to answer timely will be deemed to be an admission to the averments in the motion to revoke probation, unless the Court in its discretion elects to give consideration to any answer that is filed before the Court acts on the revocation motion.

(c) Burden of Proof and Matters Considered. The Executive Secretary has the burden of establishing by a preponderance of the evidence any violations of conditions of probation. Any reliable evidence of probative value may be considered regardless of its admissibility under rules of evidence so long as the opposing party is accorded a fair opportunity to controvert it.

(d) Disposition. After the time for filing an answer has expired, the Court may dispose of the matter on the pleadings and supportive materials or, in the event there are material factual disputes, may refer it to a hearing officer who



shall hold a hearing on the revocation motion within fourteen (14) days of the date the hearing officer is appointed. The hearing officer shall file with the Clerk of the Court findings and a recommendation within ten (10) days of the hearing. Following receipt of the hearing officer's findings and recommendation, the Court shall enter an order granting or denying the revocation motion and entering an appropriate disposition consistent with the Court's ruling in the matter.

### **Section 17.3. Service, Filing and Time Calculation**

(a) Service. Service upon the attorney and the Executive Secretary shall be by personal service or by certified mail return receipt requested. Service shall be complete and sufficient upon mailing when served upon the attorney at his current address of record on the roll of attorneys, regardless of whether the attorney claims the mail.

(b) Filing. All papers served shall be filed with the Clerk of the Court.

c) Time Calculation. If service is made by mail, an additional three (3) days shall be allowed for service of any responsive document under Section 17.1 or 17.2.

### **Section 17.4. Interim Suspension**

In addition to a motion for revocation of probation, the Executive Secretary may also file a verified motion setting forth good cause for the immediate interim suspension of the attorney's license to practice. Upon a showing of good cause, the Court may order the attorney's license suspended on an interim basis until such time as the revocation motion has been determined.

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### **Section 21. Annual registration fee**

Funds necessary to enable the Commission to carry out its functions, obligations and duties under this rule shall be provided as follows:

(a) Except as provided in subsection (b), each attorney who is a member of the bar of this Court on August 1, 1978, ~~and each attorney who is a member on August 1 of each year thereafter, and each attorney admitted *pro hac vice* pursuant to Admission and Discipline rule 3, Section 2,~~ shall so long as the attorney is a member of the Bar of this Court, pay a registration fee of ~~seventy dollars (\$70)~~ eighty dollars (\$80.00) a year on or before October 1 of such year. For each day after October 1 of a year that an attorney's registration fee is unpaid, an additional delinquent fee shall be added to the registration fee in the amount of \$5.00 for each day of delinquency, not to exceed \$100.00.

Any attorney admitted to practice law in this State on a date subsequent to



August 1 of each year shall, within ten (10) days of the date of his or her admission to the bar of the Court, or by October 1 of said year, whichever date is later, pay a registration fee of ~~\$70.00~~ eighty dollars (\$80.00). The Clerk of this Court shall furnish to the Commission the names and addresses of all persons admitted to practice subsequent to August 1 of each year as said persons are admitted.

(b) No registration fee shall be required of an attorney who files with the Clerk, on or before the date the registration fee would otherwise be due, an affidavit that he or she neither holds judicial office nor is engaged in the practice of law in this State. An attorney who is sixty-five (65) years old or older and files such an exemption affidavit may designate his or her exemption affidavit as a Retirement Affidavit. Such an affidavit once filed shall be effective for each succeeding year. An exempt or retired attorney shall promptly notify the Clerk of a desire to return to active status, and pay the applicable registration fee for the current year, prior to any act of practicing law.

(c) On or before August 1, 1975, and the first day of August in each subsequent year, the Clerk of this Court shall mail to each attorney then admitted to the bar of this Court or practicing law in this state, a notice that the registration fee must be paid or an exemption affidavit filed with the clerk on or before the first day of October. The clerk shall also send a copy of such notice to each clerk for each circuit and superior court in this State for posting in a prominent place in the courthouse and to the Indiana State Bar Association, the Bobbs-Merrill Publishing Company and the West Publishing Company for publication in their respective magazine and advance sheets. Provided, however, the failure of the Clerk to send such notice shall not mitigate the duty to pay the required fee.

(d) Any attorney who fails to pay the registration fee or file the exemption affidavit referred to in subsections (a) and (b) shall be subject to an order of suspension from the practice of law in this State and shall be subject to the sanctions for contempt of this Court in the event he or she thereafter engages in the practice of law in this State. In the event there is no other basis for the continued suspension of the attorney's license to practice law, such an attorney's privilege to practice law shall be reinstated upon submission to the Clerk of a written application for reinstatement and payment of:

- (1) the unpaid registration fee for the year of suspension;
- (2) any delinquent fees for the year of suspension due pursuant to subsection (a);
- (3) the unpaid registration fee for the year of reinstatement, if different from the year of suspension; and
- (4) an administrative reinstatement fee of two hundred dollars (\$200.00).



The Clerk shall distribute the administrative reinstatement fee referred to in ~~paragraph~~ subsection (d)(4) in equal shares to the Disciplinary Commission Fund and the Continuing Legal Education Fund.

(e) The Clerk of this Court shall issue a certificate of good standing approved by this Court to an attorney upon the receipt of the annual registration fee.

(f) All funds collected by the Clerk of this Court on behalf of the Disciplinary Commission shall be deposited in a special account to be maintained by the Clerk and designated "Clerk of the Courts-Annual Fees." As collected, the Clerk shall thereafter issue those funds to the Disciplinary Commission, and the Executive Secretary shall cause the same to be deposited into a special account designated "Supreme Court Disciplinary Commission Fund." Disbursements from the fund shall be made solely upon vouchers signed by or pursuant to the direction of the Chief Justice of this Court. All salaries to be paid shall be specifically ordered and approved by this Court.

***These amendments shall take effect on January 1, 2001.***



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## NEW BRICKS FOR THE WALL: DEVELOPMENTS IN PROPERTY LAW IN INDIANA

LLOYD T. WILSON, JR.\*

The image of construction of a great structure, commencing long ago in our legal history and growing one small brick at a time to the present, is a metaphor that has been used to describe the incremental growth of the common law.<sup>1</sup> This metaphor recognizes that the common law usually advances by small steps based on the resolution of particular disputes between particular individuals rather than by great leaps of categorical pronouncements.<sup>2</sup> Both the pace and direction of the law's construction can, however, be accelerated by legislation and certain judicial decisions. When a court determines that the time has come to exercise the common law's capacity to adapt to new conditions, rather than to hold to its predisposition to stability, another brick is added.<sup>3</sup> A case can be made that the law of the property surveyed for this law review in 1999<sup>4</sup> exhibited an unusual emphasis in that year on categorical, as opposed to incremental, growth. In that survey period, the Indiana legislature redefined real estate broker duties owed to buyers and sellers to eliminate the principle of subagency that had been in place for decades<sup>5</sup> and rearranged priority positions, at least in commercial developments, between construction lenders and mechanics and material suppliers.<sup>6</sup> Finally, the Indiana Supreme Court announced that the proper framework for analyzing tenants' claims against landlords for personal injuries sustained in leased residential housing sounds in tort and not in contract for breach of warranty.<sup>7</sup> In the 1999 survey period, new bricks were not only added to the legal wall, but the architects of that wall also decided to turn the course of

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\* Instructor of Law, Indiana University School of Law—Indianapolis; Instructor of Business Law, Kelley School of Business, Indiana University—Bloomington. The author wishes to acknowledge the valuable contributions made to this article by five alumni of his real estate transfer, finance, and development class: Heather D. Boyle, Rodney L. Michael, Matthew J. Mize, Katherine A. Starks, and Dori E. Wood. These students, who volunteered many hours to research new developments in Indiana statutory and case law and to help narrow them to the cases and statutes described in this Article, were extraordinarily dedicated to their adopted project, and their efforts deserve recognition.

1. Karl Lewellen describes this process of growth of the law as "a course of building as steady, as irresistible, as craftsmanlike, in some ways as beautiful, as that which through the medieval centuries raised cathedrals." K.N. LEWELLEN, *BRAMBLE BUSH* 176 (1960).

2. See OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (Dover Publications, Inc. 1991).

3. See ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 182 (Beacon Press 1963).

4. Lloyd T. Wilson, Jr., *Reconstructing Property Law in Indiana: Altering Familiar Landscapes*, 33 IND. L. REV. 1405 (2000).

5. See *id.* at 1419-31. The statutes that effected this change are Indiana Code sections 25-34.1-10-0.5 to -34-10-17. The survey period for that Article was October 1, 1998, to September 30, 1999.

6. See *id.* at 1406-19. The statutes that effected this change are Indiana Code sections 32-8-3-1 to -3-15.

7. See *id.* at 1440-53. The supreme court's analysis of this issue is found in *Johnson v. Scandia Associates, Inc.*, 717 N.E.2d 24 (Ind. 1999).



its direction.

The state of the law for the survey period for this article returns to the model of methodical and incremental growth. The legislature was not particularly active in property matters in 2000,<sup>8</sup> a fact that may be explained both by the relative fury of activity in 1999 and the reality of the short legislative session in 2000. The opinions published by the appellate courts in 2000 focus on adapting existing rules to fit new situations rather than on creating new rules. This fact does not mean that the appellate opinions issued in 2000 are not interesting or important, for they are both. It means only that the analysis in those opinions is conducted within an existing context rather than creating new contextual rules.

Six topics considered by the appellate courts are discussed in this article: (1) enforceability and priority of mechanic's liens; (2) rights and responsibilities of real estate licencees and landowners under exclusive right to sell listing agreements; (3) duties and liabilities of landlords to tenants; (4) premises liability; (5) mortgagee duties to mortgagors and to third parties, and mortgage enforcement procedures; and (6) the impact of the statute of frauds on real estate conveyances. The first three of these topics relate to issues considered in the 1999 survey issue.

### I. MECHANIC'S LIENS

The Indiana Court of Appeals issued four opinions in 2000 that build upon existing mechanic's lien law principles. These cases are: *Dinsmore v. Lake Electric Co.*;<sup>9</sup> *Rose & Walker, Inc. v. Swaffar*;<sup>10</sup> *Ford v. Culp Custom Homes, Inc.*;<sup>11</sup> and *Mercantile National Bank of Indiana v. First Builders of Indiana, Inc.*<sup>12</sup> The amendments to the mechanic's lien statute passed by the Indiana legislature in 1999, which became effective on July 1, 1999, have not had time

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8. Two statutes enacted by the Indiana General Assembly and signed into law by the Governor are: 1) Public Law 22-2000, House Enrolled Act 1180, codified as IND. CODE § 4-20.5-21-1 and -21-2 (permitting the words of the Ten Commandments to be displayed on real property owned by the State of Indiana) and IND. CODE § 36-1-16-1 and -16-2 (permitting the words of the Ten Commandments to be displayed on real property owned by a political subdivision). (These statutes were declared to be unconstitutional under the establishment clause of the First Amendment of the United States Constitution in the case of *Indiana Civil Liberties Union, Inc. v. O'Bannon*, 110 F. Supp. 2d 842 (S.D. Ind. 2000). and 2) Public Law 49-2000, House Enrolled Act 1228, codified as amendments to IND. CODE § 36-4-3-2.1 (providing notice procedures in annexation proceedings in which all property owners within the area to be annexed provide written consent to the annexation). The legislature passed Public Law 129-2000, Senate Enrolled Act 262 (directing the Indiana Department of Environmental Management to develop a non-rule policy document to address the migration of a spill or release from an underground storage tank to property that is owned by a person who does not own or operate the site where the UST is located).

9. 719 N.E.2d 1282 (Ind. Ct. App. 1999).

10. 721 N.E.2d 899 (Ind. Ct. App. 2000).

11. 731 N.E.2d 468 (Ind. Ct. App. 2000).

12. 732 N.E.2d 1287 (Ind. Ct. App. 2000).



to present issues for litigation that could reach the appellate court level. As a result, the cases confronted by the court of appeals in 2000 dealt with pre-amendment rules. However, because many pre-amendment rules were not affected by changes in the statute, the court's opinions in these four cases remain important.

*A. Scope of Property Against Which a Mechanic's Lien Can Be Filed:*

*Dinsmore v. Lake Electric Co.*<sup>13</sup>

In *Dinsmore*, the court was required to decide whether a bagger machine used by a lessee of real estate to screen, bag and dry various products was a proper subject of a mechanic's lien under Indiana's statute.<sup>14</sup> The determination of the status of the bagger was crucial to the determination of the timeliness of Lake Electric's mechanic's lien filing. Lake provided electrical services to the lessee of the real estate, NIR, in various time periods. It first performed work between November 8, 1993, and March 16, 1994, for which it received only partial payment. Lake then provided additional services in April 1995, when it built a control system, repaired a burner control, and fixed the outside bagger system. Finally, Lake provided repair services on the bagger between May 20 and May 22, 1995. Lake filed its notice of intention to hold a mechanic's lien on July 21, 1995, which included all work performed from November 8, 1993, forward. Following a bench trial, the trial court entered a judgment in favor of Lake on its claim to foreclose on its mechanic's lien.<sup>15</sup>

The court of appeals reversed the judgment of the trial court, holding that the bagger was not a type of property that was subject to a mechanic's lien.<sup>16</sup> The court of appeals reviewed the types of property identified in section 1 of the mechanic's lien statute and concluded that the only kinds of property that could conceivably include the bagger were "fixture" and "other structure."<sup>17</sup> The court of appeals relied on three factors in deciding that the bagger was neither a fixture nor an other structure: its portability; its ability to be removed from the real estate without damage to any buildings or land; and NIR's intent to remove the bagger from the real estate at the end of the lease term.<sup>18</sup> Based on these factors, the court of appeals concluded that the bagger was either an item of personal property or a trade fixture, neither of which can be the subject of the mechanic's lien.<sup>19</sup> The entire lien was thus invalid because Lake provided no other work or

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13. *Dinsmore*, 719 N.E.2d at 1282.

14. *See id.* at 1284. *Dinsmore* was reviewed in the 2000 volume of the survey edition of this law review, and the reader should consult the author's article in that edition, *see Wilson, supra* note 3, at 1415-16.

15. *See id.* at 1285.

16. *See id.* at 1288-89.

17. *See id.* at 1286.

18. *See id.* at 1288.

19. *See id.*



materials during the sixty days prior to the July 21 filing of its mechanic's lien.<sup>20</sup>

*Dinsmore* implicitly reaffirms the long-established analytical framework used by courts in ruling on the validity of mechanic's liens. Courts strictly construe the lienholder's compliance with all elements of the statute<sup>21</sup> because mechanic's liens are purely creatures of statute and are in derogation of the common law.<sup>22</sup> Although Indiana courts utilize a liberal construction of the remedial provisions of the mechanic's lien statute once a claimant establishes that his claim is within the scope of the statute,<sup>23</sup> strict compliance is initially required for each element of the statute, including the type of property improved and the time provided for filing the notice of intention to hold mechanic's lien.

*B. Recording Requirement for Pre-Lien Notice:*

*Rose & Walker, Inc. v. Swaffar*<sup>24</sup>

In *Rose & Walker*, the court of appeals applied the strict compliance approach to the statutory requirement of recording the claimant's pre-lien notice. The Swaffars were constructing a home on their lot, and Rose & Walker provided insulation and drywall for the construction but was never paid. Rose & Walker mailed a Notice of Lien Rights and Personal Liability letter to the Swaffars, and it recorded its Notice of Mechanic's Lien in the office of the county recorder. Rose & Walker subsequently filed a lawsuit to foreclose on its mechanic's lien. The parties thereafter filed cross-motions for summary judgment. The trial court denied Rose & Walker's motion because it failed to record a copy of the Notice of Lien Rights and Personal Liability letter it mailed to the Swaffars.<sup>25</sup> Rose & Walker appealed.

Rose & Walker clearly complied with the pre-lien notice requirements of Indiana Code section 32-8-3-3, but at issue was its compliance with the recording requirement for that notice, contained in Indiana Code section 32-8-3-1. This section states that a mechanic's lien claimant shall

furnish the owner of the real estate . . . with a written notice of the

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20. *See id.*

21. *See, e.g., Abbey Villas Dev. Corp. v. Site Contractors, Inc.*, 716 N.E.2d 91, 98 (Ind. Ct. App. 1999) ("As the Indiana statutes governing the filing of a notice of intention to hold a mechanic's lien . . . [are] in derogation of the common law, their provisions must be strictly construed."); *Riddle v. Newton Crane Serv., Inc.*, 661 N.E.2d 6, 9 (Ind. Ct. App. 1996) ("The Indiana statute governing filing of a notice of intention to hold mechanic's lien is in derogation of common law, and its provisions must be strictly construed.").

22. *See, e.g., Garage Doors of Indianapolis, Inc. v. Morton*, 682 N.E.2d 1296, 1302 (Ind. Ct. App. 1997).

23. *See, e.g., Abbey Villas*, 716 N.E.2d at 98 (stating that once claimants prove they are within Indiana's mechanic's lien statute, "the remedial provisions of the legislation should be liberally construed") (citing *Beneficial Fin. Co. v. Wegmiller Bender Lumber Co.*, 402 N.E.2d 41, 45 (Ind. Ct. App. 1980)).

24. 721 N.E.2d 899 (Ind. Ct. App. 2000).

25. *See id.* at 900.



delivery [of materials] or [provision of] labor and the existence of lien rights within sixty (60) days from the date of the first delivery or labor performed *and* shall file a copy of the written notice in the recorder's office of the county within sixty (60) days from the date of the first delivery or labor performed.<sup>26</sup>

Rose & Walker did not comply with the recording requirement but urged the court to adopt a liberal reading of the statutory clause "shall file" that would render the failure to record the notice letter with the recorder's office harmless if no third party was adversely affected. In rejecting Rose & Walker's argument, the court of appeals identified two purposes furthered by the public filing requirement. First, the filing puts the landowner on notice that a lien has been placed on his property.<sup>27</sup> Second, the filing puts third party buyers on notice that the lien exists.<sup>28</sup> Of course, that notice would also be of keen interest to other third parties who might contemplate dealing with the real estate, including other providers of materials or labor and creditors who might wish to secure an extension of credit by a lien on the real estate.

The court of appeals noted that the second purpose of the public filing requirement was left unfulfilled by Rose & Walker's failure to record its pre-lien notice.<sup>29</sup> Instead of permitting a claimant to avoid the statute by demonstrating that no actual harm had occurred to a third party, the court evaluated the validity of Rose & Walker's mechanic's lien "in accordance with the strict rules of construction applied to these statutes."<sup>30</sup> In so doing, the court of appeals also supported the integrity of the public document recording system. An exception to the recording requirement would have created a gap in the public records and would have rendered those records less reliable for persons looking to acquire an interest in real estate.

*C. Venue and Recoverable Expenses: Ford v. Culp Custom Homes, Inc.*<sup>31</sup>

In *Ford*, the court of appeals considered the proper venue for filing a complaint to foreclose on a mechanic's lien and types of expenses that can properly be included in a lien. In this case, the Fords entered into a contract with Culp Custom Homes to build a house. Under this contract Culp was also to serve as general contractor. In return, the Fords agreed to pay Culp the total construction costs on a cost-plus basis and an eight percent contracting fee. Mrs. Ford's parents provided the financing for the construction of the home, and they recorded their mortgage against the real estate on August 9, 1995, in the office of the Recorder of LaPorte County.

Construction began on May 30, 1995, and disputes about the construction

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26. IND. CODE § 32-8-3-1 (1998) (emphasis added).

27. *See Rose & Walker*, 721 N.E.2d at 902.

28. *See id.*

29. *See id.*

30. *Id.*

31. 731 N.E.2d 468 (Ind. Ct. App. 2000).



began shortly thereafter. By August of 1995, the Fords had fired Culp, and Culp terminated its work on the house. On October 13, 1995, Culp recorded its Notice of Mechanic's Lien in LaPorte County. The amount of the lien included sums due to Culp and due to another material supplier.

On October 31, 1995, Mrs. Ford's parents, as mortgagees, served Culp with a Notice to Commence Suit within thirty days, pursuant to Indiana Code section 32-8-3-10. On November 25, 1995, Culp filed a complaint, including a claim to foreclose its mechanic's lien, in the St. Joseph Circuit Court. The St. Joseph Circuit Court later transferred the case to the LaPorte Circuit Court, which accepted the transfer.<sup>32</sup> The Fords and the mortgagees filed motions to dismiss the mechanic's lien foreclosure count of Culp's complaint. Both motions were denied, and the Fords and the mortgagees appealed.<sup>33</sup>

The venue issue arose because the mechanic's lien claimant, Culp, filed its complaint to foreclose on mechanic's lien in a county other than the one in which the real estate is located. The Fords and the mortgagees argued that Culp's choice of venue rendered its mechanic's lien invalid. The court of appeals first noted that even though Indiana Code section 32-8-3-3 (pre-lien notice filing requirement) and Indiana Code section 32-8-3-6 (enforcement of mechanic's lien) both specifically require the mechanic's filing to occur in the county in which the subject real estate is located, the notice to commence suit provisions of Indiana Code section 32-8-3-10 are silent as to where suit must be filed.<sup>34</sup> To effect harmony and consistency among statutes that are *in pari materia*, the court of appeals held that section 10 imposes the same venue requirement as sections 3 and 6. Despite Culp's failure to file its complaint to foreclose on its mechanic's lien in the county where the real estate is located, the court of appeals concluded that Culp's claim was not subject to dismissal on that ground.<sup>35</sup> Instead, the general venue rules of Trial Rule 75 required that the case be transferred to the county where the real estate is located.

The court of appeals concluded that the provision of Trial Rule 75(D), which says: "No statute or rule fixing the place of trial shall be deemed a requirement of jurisdiction,"<sup>36</sup> means that the county where the subject real estate is located is the preferred venue, but filing a complaint to foreclose on a mechanic's lien in that county is not a jurisdictional requirement.<sup>37</sup> As a result, the trial rules provide one exception to the generally observed rule that strict compliance with the terms of the mechanic's lien statute is required for a trial court to have jurisdiction over a mechanic's lien claim.

The second issue considered by the court of appeals in *Ford* was the proper economic components of a mechanic's lien claim. Culp's claim contained three components: 1) \$22,301.49 that Culp owed to one material supplier for lumber

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32. See *id.* at 471.

33. See *id.*

34. See *id.* at 472-73.

35. See *id.* at 473-74.

36. IND. TRIAL RULE 75(D).

37. See *Ford*, 731 N.E.2d at 473.



used on the project; 2) \$15,510.99 owed to a second material supplier for concrete products; and 3) Culp's eight percent contracting fee. The Fords and the mortgagees challenged these components on the grounds that a mechanic's lien claimant cannot assert a lien for labor or materials provided by third parties and cannot assert a lien for profit, which is the way they characterized Culp's contracting fee.

The Fords and the mortgagees further argued that Culp should not be permitted to include in its claim sums owed to the two material suppliers because both of those material suppliers had failed to send pre-lien notices and failed to timely record their liens. The Fords and the mortgagees argued that to permit the sums owed to these two material suppliers to be included in Culp's lien claim would be to open a backdoor that would enable mechanics to avoid the requirements of the mechanic's lien statute.

The Fords and the mortgagees' argument failed because of Culp's status as general contractor on the construction project. Culp was liable to the material suppliers for the cost of materials it ordered because, as general contractor, Culp was responsible for furnishing the labor and materials for the project. Thus, the court of appeals concluded that even though the materials originated from other sources, Culp was asserting a lien on its own behalf and not on the behalf of the suppliers to whom it was obligated.<sup>38</sup> The court of appeals noted that the remedial purpose of the mechanic's lien statute, including the prevention of "the inequity of a property owner enjoying the benefits of the labor and materials furnished by others without recompense,"<sup>39</sup> would be frustrated if a general contractor were prohibited from asserting a lien that includes labor or materials supplied by others when that general contractor is liable both to the owner and to the subcontractors hired to complete the project.<sup>40</sup>

The final disputed component of Culp's lien claim was its contracting fee. The Fords and the mortgagees characterized this fee as profit, which had not previously been considered an item for which a lien can be asserted under Indiana Code section 32-8-3-1. The court of appeals acknowledged that section 1 of the mechanic's lien statute does not specifically mention profit as an item that can be included in a mechanic's lien claim<sup>41</sup> but noted that a cost-plus contracting fee has been recognized as lienable, so long as the contractor's work included more than supervision.<sup>42</sup>

The court of appeals expanded the existing rule, and stated that profit is indeed an item properly recoverable by way of a mechanic's lien under section 1.<sup>43</sup> The court concluded that "any claim for labor or materials reasonably

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38. *See id.* at 474.

39. *Id.* at 472.

40. *See id.* at 475.

41. *See id.*

42. *See id.* (citing *Premier Invs. v. Suites of Am., Inc.*, 644 N.E.2d 124, 127 (Ind. 1994)).

43. *See id.* The exact words of the court are: "We decline to require that any person or entity asserting a mechanic's lien must exclude from that lien any monies that constitute profit to the claimant." *Id.* Stated positively instead of with multiple negatives, the court's holding is that a



includes some degree of profit," and that "[o]perating expenses, such as obtaining the supplies and delivering the product, are inseparably connected to the 'cost' of the materials, and constitute labor and materials within the meaning of the mechanic's lien statutes."<sup>44</sup>

*Ford* may be an accurate recognition of the fact that materials and services are provided by businesses and individuals on a for-profit basis, but a blanket assertion that profit is a lienable item under the mechanic's lien statute should be qualified by a requirement that the profit component must have been agreed to by the land owner or agent purchasing material or labor on his behalf. The prices charged by a material supplier or laborer, and upon which each may assert a mechanic's lien, will necessarily already include a profit component that the owner agrees to by virtue of his purchase of the supplies or labor. Similarly, a contractor working on a cost-plus basis will have obtained the owner's agreement to the plus-profit component before work begins.

What would not be proper is for a contractor to assert a lien for profit in the sense of lost opportunity profits incurred as a result of the contractor's termination prior to the completion of the project. In *Ford*, Culp's contracting fee profit must be restricted under the mechanic's lien statute to the percentage of profit previously agreed to and to the amount of materials and labor supplied to the project before it was discharged. Whatever extra profit Culp might have earned had the project continued to completion would not relate to materials and labor provided for the improvement of the real estate, as required by section 1. Whether such lost opportunity profit is recoverable under breach of contract theory will depend on contract principles, but such profit should not be lienable under the mechanic's lien statute.

*D. Personal Liability Statute: Mercantile National Bank of Indiana v. First Builders of Indiana, Inc.*<sup>45</sup>

In the final mechanic's lien case to be surveyed, *Mercantile National Bank*, the court of appeals had to determine the responsibilities of the owner of real estate to a material supplier who brought an action to foreclose a mechanic's lien and to hold the owner personally liable for the cost of materials that were provided to the project but for which the supplier had not been paid when the cost of completing the project far exceeded the contract price.

In the spring of 1994, the Thompsons entered into a contract with First Builders of Indiana, Inc. (FBOI) for the construction of a house. FBOI opened an account with Schilling Brothers Lumber and Hardware (Schilling) for the purchase of building materials. The Thompsons were aware of the existence of this account and at various times selected items to be charged to it. By July 1994, the Thompsons noticed a number of construction deficiencies,

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person or entity asserting a mechanic's lien may include in that lien monies that constitute profit to the claimant.

44. *Id.*

45. 732 N.E.2d 1287 (Ind. Ct. App. 2000).



unauthorized structural changes and variations from the agreed design. FBOI assured the Thompsons that the problems would be remedied. In September and December 1994, the Thompsons paid FBOI the first two construction draws pursuant to their contract. Part of those draws was paid to Schilling for materials supplied. The Thompsons continued to notice deficiencies in the construction and, on December 22, asked FBOI to address them. When FBOI did not respond to the Thompsons' complaints, they refused to pay the third draw and FBOI ceased work on the house.

FBOI sued the Thompsons for failure to pay the third draw. Schilling intervened and asserted a claim against the Thompsons and FBOI to foreclose on its mechanic's lien and to obtain a judgment against both defendants for the value of the materials it had provided to the project. The Thompsons moved for summary judgment on Schilling's mechanic's lien claim, and, for reasons not stated in the appellate opinion, that motion was granted.<sup>46</sup>

After the Thompsons filed their motion for summary judgment on the mechanic's lien claim, but before the trial court ruled on the motion, Schilling sent to the Thompsons a notice of intent to hold the owner personally liable, under Indiana Code section 32-8-3-9, for the balance of the cost of materials it had provided. The trial court entered judgment in favor of Schilling on this claim.<sup>47</sup> The Thompsons' first basis for challenging the decision of the trial court was that no cause of action existed between Schilling and them. This argument was based on the absence of any explicit reference to the personal liability provisions of the mechanic's lien statute in Schilling's complaint. The court of appeals rejected this argument by concluding that the presence of this issue could be inferred from the pleadings.<sup>48</sup> Further, the court concluded that the issue had, in fact, been tried with the implied consent of the parties, and thus the pleadings were deemed amended to conform to the evidence.<sup>49</sup>

The Thompsons next argued that even if Schilling did assert a claim under the personal liability statute, it could not recover from them because a subcontractor's right to recover under the statute is limited to the amount of money that the owner owes the contractor. The Thompsons argued that they did not owe any money to FBOI because the cost to repair the defective work done by FBOI far exceeded the amount they owed to FBOI under the contract. The court of appeals rejected this argument as inconsistent with the purpose of the personal liability statute.<sup>50</sup>

Central to the court of appeals' analysis is the decision of *McCorry v. G. Cowser Construction, Inc.*<sup>51</sup> The court of appeals quoted *McCorry* for the rule that "the amount 'due' means the amount unpaid on the original contract, 'which amount would have been available for payment of subcontractors had the

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46. *See id.* at 1289.

47. *See id.*

48. *See id.* at 1290.

49. *See id.* at 1290-91.

50. *See id.* at 1291.

51. 636 N.E.2d 1273 (Ind. Ct. App. 1994).



contractor not defaulted.”<sup>52</sup> Accordingly, a bona fide indebtedness exists from the property owner to subcontractors after the contractor’s default even if the owner is compelled to pay more to have the construction completed properly than he would have owed if the contractor had completed the contract.<sup>53</sup> Any other result, the court said, would mean that no subcontractor would ever be able to recover under the personal liability statute after a contractor default, and the purpose of the statute would be defeated.<sup>54</sup> That purpose, as stated by the court of appeals, is “to protect a subcontractor ‘from the consequences of the contractor’s absconding or going broke or otherwise defaulting’ by providing to the subcontractor a means of shifting from himself to the owner the burden of the general contractor’s financial difficulties.”<sup>55</sup>

The difference between this case and *McCorry* relates to the existence of money unpaid to the contractor at the time of default. In *McCorry*, the home owner had paid to the general contractor at the time of termination only \$108,300 out of a contract price of \$170,000. The Thompsons, by contrast, apparently contended that they had already paid out the full contract price by the time they terminated their relationship with FBOI. Even if that were the case, the court of appeals determined that several of the items that were included in the Thompsons’ calculation of expenditures had either been purchased by them and had been credited against the contract price, were outside the scope of the original contract, or were for upgrades from the original contract.<sup>56</sup> As a result, the court held that the Thompsons had in fact paid to FBOI \$70,000 less than the contract price and thus were liable to Schilling for the nearly \$43,000 it claimed under the personal liability statute.<sup>57</sup>

*Mercantile National Bank* demonstrates that an unwary owner can incur liability for expenses in excess of the original construction contract price by using the unpaid portion of the original contract to pay for extra-contractual materials or labor to correct defective work by the original contractor and by his own direct participation in the materials purchasing process. The answer to these problems, of course, lies in traditional owner-protection devices such as no-lien contracts, lien waivers by material suppliers and laborers upon progress payments, and checks paid jointly to the general contractor and subcontractors. Although the availability of these remedies is restricted in commercial construction projects by the 1999 revision of the mechanic’s lien statute,<sup>58</sup> they are still available to protect individual homeowners like the Thompsons. If a homeowner fails to use available tools to protect his interests, or does not know

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52. *Mercantile Nat’l Bank*, 732 N.E.2d at 1292 (quoting *McCorry*, 636 N.E.2d at 1279).

53. *See id.*

54. *See id.*

55. *See id.* at 1291 (quoting *McCorry*, 636 N.E.2d at 1278).

56. *See id.* at 1292.

57. *See id.*

58. *See* Acts of April 23, 1999, Pub. L. No. 53-1999, 1999 Ind. Acts 292 (codified as amended at IND. CODE §§ 32-8-3-1 to -3-15 (Supp. 1999)); *see also* Wilson, *supra* note 4, at 1406-19.



about them, he may be compelled by the personal liability statute to pay twice.

## II. RIGHTS AND RESPONSIBILITIES OF REAL ESTATE LICENSEES

The property section of the 2000 edition of this law review contains an extensive discussion of the fundamental changes made to the law governing the relationship between real estate licensees and buyers and sellers of real estate.<sup>59</sup> In revisions made to Indiana Code sections 25-34.1-10-0.5 to -34.1-10-17, the legislature eliminated the long-standing principle of subagency and substituted a set of duties existing between a real estate licensee and a buyer or seller based on a customer relationship.<sup>60</sup> Similar to the significant changes made to the mechanic's lien statute in 1999, cases dealing with the changes made to the real estate agency statute have not yet had an opportunity to make their way through the appellate process. Nevertheless, two cases addressing rights and responsibilities of real estate licensees and landowners under exclusive listing agreements were addressed by the court of appeals during the survey period of this article.

### A. *Exclusive Right to Sell Listing Agreement: Samar, Inc. v. Hofferth*<sup>61</sup>

In *Samar Inc.*, Hofferth brought a breach of contract claim against Samar for failure to pay a real estate commission to Hofferth pursuant to an exclusive right to sell listing agreement the parties had executed. The trial court entered a judgment in favor of Hofferth,<sup>62</sup> and Samar appealed.

On April 1, 1997, Samar entered into a listing agreement with Hofferth, a real estate broker. The agreement contained an "exclusive right to sell" clause and was effective from April 1 to October 1, 1997. In addition, the agreement contained an extension clause that provided:

In the event of any transfer of an interest in said real estate within 180 days after the expiration of this Listing Contract and its extensions, to any person, firm or corporation who has been introduced, interested, or shown the property during the exclusive period of [the] listing by the Owner or by the Broker . . . Owner agrees to pay Broker a Commission as provided by this Listing Contract. . . .<sup>63</sup>

The exclusivity provision in favor of Hofferth would cease to apply only if during the extension term Samar relisted the real estate with another broker under an exclusive right to sell listing contract.

In August 1997, Hofferth showed Samar's property to Lalwani, L.L.C. In September, Lalwani made an offer to purchase the property, and Samar accepted that offer. Subsequently, a dispute arose between Samar and Lalwani, and the

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59. See Wilson, *supra* note 4, at 1419-31.

60. Act of May 3, 1999, Pub. L. 130-1999, 1999 Ind. Act 696.

61. 726 N.E.2d 1286 (Ind. Ct. App. 2000).

62. See *id.* at 1288.

63. *Id.*



sale was canceled. When the listing agreement expired on October 1, 1997, Hofferth refused to relist the property because of problems that had developed with Samar, including Samar's request that Hofferth agree to a reduced commission. Sometime later in October, Samar again negotiated with Lalwani and asked Hofferth if he would "put the deal together" for a commission significantly less than provided in the original listing agreement. Hofferth declined and reminded Samar of the extension clause contained in that agreement. Samar responded that he could defeat Hofferth's rights under the original contract by relisting the property with another broker.

Thereafter, on October 23, 1997, Samar entered into an exclusive right to sell listing contract with another broker. However, Samar excluded one party from this agreement, Lalwani. Under the new agreement, if the property were sold to Lalwani the new broker would not earn a commission. On October 30, Samar and Lalwani entered into an agreement for the sale of the real estate at the same price as in Lalwani's previous offer. The new broker did nothing to facilitate the sale, was paid only \$1500 for his time and was not paid a commission. Hofferth sued Samar to recover the ten percent commission payable under the exclusive listing agreement he had with Samar, and the trial court entered judgment in his favor. Samar appealed, contending that the trial court erred when it concluded that he had not relisted the property with another broker under an exclusive right to sell contract.

The court of appeals identified the "pivotal issue" in determining whether Hofferth was entitled to a commission as whether the contract that Samar entered into with the second broker was an exclusive right to sell listing contract.<sup>64</sup> In addressing this issue, the court of appeals stated that real estate brokerage contracts are subject to the same rules of construction as are applied to all other types of contracts.<sup>65</sup> One such rule requires a court to interpret the language used in a contract so as not to render any words meaningless; another rule requires a court to further the paramount goal of carrying out the intent of the parties.<sup>66</sup>

The court correctly identified the purpose of including an extension clause in a real estate listing contract as providing protection for a broker who "has expended time and effort in discovering a purchaser, but the sale of the listed property to that purchaser does not occur until after the expiration of the term of the listing contract."<sup>67</sup> There would be no protection if a buyer is found during the term of the listing agreement, but the seller "avoid[s] the commission through the simple device of waiting until the brokerage contract had expired."<sup>68</sup>

Samar clearly intended to avoid paying a commission to Hofferth. He not only attempted to avoid paying a commission to Hofferth by waiting to sell after the end of the term of the listing agreement but he also entered into a new agreement with a second broker, which excluded Lalwani, a buyer procured by

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64. *See id.* at 1289.

65. *See id.* at 1290.

66. *See id.*

67. *Id.*

68. *Id.* (quoting *Ackerman v. Dobbs*, 580 N.Y.S.2d 793, 795 (App. Div. 1992)).



Hofferth. This behavior was transparent, and the court of appeals refused to permit Samar to avoid its contractual obligations to Hofferth.<sup>69</sup>

It is important to note that the court did not invalidate clauses that exclude certain potential parties from exclusive right to sell listing agreements. There is no question that such exclusions can be included when the exclusive right to sell agreement is originally executed.<sup>70</sup> They are not permissible, however, “where the party [sought to be excluded by the seller] is subject to an extension clause and the buyer sought to be exempted is one to whom the extension clause applies.”<sup>71</sup> There is also no dispute that an owner of real estate can avoid paying a commission to a broker if the parties have executed a non-exclusive listing agreement and if a buyer is located solely by the efforts of the owner. Apart from these two situations, however, the law will protect the broker’s legitimate expectation of a commission as agreed in the listing contract and will reject an owner’s attempts to obtain the benefits of a broker’s services without paying for them.

*B. Exclusive Right-to-Sell Agreements: Rogier v. American Testing & Engineering Corp.*<sup>72</sup>

In *Rogier*, the court of appeals was presented with wide-ranging set of issues relating to an exclusive right-to-sell agreement. These issues included: determining whether a listing agreement was an exclusive right-to-sell contract or an exclusive agency contract; whether the agreement had terminated by the passage of time; whether the agreement was void for lack of consideration; whether the agreement was void for lack of mutuality; whether the agreement had been revoked by the passage of ten years after the date of execution; whether the broker had abandoned the agreement by not contacting the seller for two years; whether the broker had waived his rights under the agreement as a result of failing to communicate with the seller; whether the agreement was unenforceable because the broker had failed to disclose the exclusive right-to-sell feature of the agreement to the seller; and whether the seller had repudiated the agreement and thereby precluded the broker from performing his duties. At the heart of all of these issues is the same fundamental problem that lay at the heart of the *Samar* case—under what circumstances does a broker earn a commission under an agency agreement.

The facts of this case are lengthy, but an understanding of the actions and chronology is important for understanding the court’s opinion. Rogier was a marketing consultant who was experienced in sales, mergers, and acquisitions of commercial businesses, including environmental firms. American Testing & Engineering Corp. (ATEC) was an environmental engineering firm. By 1984 ATEC’s president had decided to sell the business, and on April 24, 1984, ATEC

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69. *See id.*

70. *See id.*

71. *Id.*

72. 734 N.E.2d 606 (Ind. Ct. App. 2000).



and Rogier entered into a listing agreement whereby Rogier would seek suitable buyers. That agreement contained a clause that read: "6. EXCLUSIVE AGENT. [ATEC] appoints [Rogier] as the exclusive agent with an exclusive listing and all prospective buyers shall send copies of all correspondence and purchase offers to [ATEC] and [Rogier]."<sup>73</sup> If Rogier's services resulted in a "merger, acquisition, joint-venture, sub-contract, association, teaming or employment contract,"<sup>74</sup> the buyer, not ATEC, would pay Rogier. ATEC was obligated, however, to provide Rogier with its financial and business records so that Rogier could make presentations to prospective buyers. These records were referred to as "presentation materials."

From 1984 to 1990, Rogier "routinely" contacted ATEC with opportunities to sell the company, but ATEC's president did not begin to take "active steps" to sell until 1990. This six-year period of inactivity by the seller proved to be significant for the court of appeals is recognizing the continuing validity of the listing agreement following periods of apparent inactivity by Rogier.

In June 1990, Rogier entered into a search agreement with Baker, a large engineering firm that was looking to acquire businesses like ATEC. The search agreement provided that Rogier would be paid a commission of five percent of ATEC's gross income for the year prior to sale if Baker purchased ATEC. It further provided that Baker would pay Rogier two percent of that gross income immediately upon Rogier's sales presentation even in no purchase occurred.

From mid-1990 to the end of 1993, Rogier did not communicate with ATEC. Despite that lack of communication the trial record reflected that Rogier continued to work under listing agreement but that ATEC was unaware of his work. On or about January 21, 1994, Rogier notified ATEC in writing that Baker was interested in acquiring ATEC. Rogier asked ATEC to sign a "purchase offer letter" authorizing him to present ATEC to Baker as a possible acquisition candidate. ATEC eventually responded to Rogier's request and agreed to provide the presentation documents so that Rogier could Baker could make a "realistic offer."

On May 26, 1994, Baker reaffirmed its interest in making an offer to buy ATEC and asked Rogier to obtain certain additional financial information. In June and July, Rogier communicated with both ATEC and Baker to finalize a deal, but he was unable to make a sales presentation because ATEC refused to provide the requested financial and operations data. On July 29, 1994, Baker advised Rogier that it was no longer interested in acquiring ATEC. Rogier's last communication with ATEC was on July 29, 1994, although he continued to work under the listing agreement after that date.

In mid-1994, without informing Rogier, ATEC initiated contacts with another interested buyer, ATC. ATEC provided financial and operations data to ATC. In 1996 ATEC sold its business to ATC for "a large eight-figure sum" without involving Rogier or any other broker. In other words, ATEC sold its business "By Owner" when it was arguably subject to a listing agreement with

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73. *Id.* at 611 (brackets in original).

74. *Id.*



Rogier.

When Rogier learned of the sale through a business journal, he filed suit against ATEC alleging that ATEC breached the listing agreement by: 1) refusing to provide the presentation materials so that Rogier could make a sales presentation to Baker and 2) filing to disclose the existence of the sale. As a result of ATEC's alleged breach, Rogier argued that he was damaged by the lost opportunity to make a sales presentation to Baker and by the loss of a commission on the sale to ATC. The trial court entered summary judgment in favor of ATEC, concluding that Rogier had sustained no damages as a result of ATEC's conduct and that the listing agreement was unenforceable, had terminated, or was abandoned or waived by Rogier as a matter of law.<sup>75</sup> Rogier appealed. The court of appeals affirmed the trial court's ruling with regard to the "lost opportunity" damages relating to his inability to make a presentation to Baker but reversed the trial court's decision with regard to Rogier's claim that he was entitled to receive a commission on the sale to ATC by virtue of an exclusive right-to-sell clause in the listing agreement.<sup>76</sup>

Because of the large number of issues raised by the parties in this case, the court of appeals' decision contains a thorough review of rules relating to broker listing agreements. This article will not attempt to review all of those issues. Instead it will focus on the fundamental issues of determining the nature of the agreement between Rogier and ATEC and the impact that determination has on Rogier's claim that a commission had been earned and was payable by ATEC.

ATEC argued that under the listing agreement it retained the discretion to sell its own business, and that the agreement conferred on Rogier an exclusive listing but not an exclusive right to sell. Under this view, Rogier's commission would be earned only if he were the "procuring cause" of the sale of ATEC's business. Rogier argued that the listing agreement conferred on him an exclusive right to sell ATEC's business, which meant that his commission was earned even if he were not the procuring cause. The court of appeals agreed with Rogier.<sup>77</sup>

The court of appeals began its analysis of the listing agreement by stating that "[i]t has long been the rule in Indiana that a broker earns its commission when it causes a sale or procures a buyer ready, willing, and able to purchase."<sup>78</sup> The court added that "in the absence of a special contract to the contrary,"<sup>79</sup> a broker must be the procuring cause to be entitled to receive a commission. But, "[n]otwithstanding the doctrine of procuring cause, Indiana courts will enforce specific provisions in a listing contract which allow a broker to earn a commission under other circumstances."<sup>80</sup> With regard to such circumstances, the court of appeals observed that "a listing contract may grant a broker the right to a commission even if the broker did nothing to contribute to the sale of the

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75. *See id.* at 613.

76. *Id.* at 621-22.

77. *See id.* at 615.

78. *Id.*

79. *Id.*

80. *Id.*



property and regardless of whether the sale was effected by the broker or the owner or by any other person.”<sup>81</sup> Rogier’s claim for payment of a commission on ATEC’s “by owner” sale to ATC depended, therefore, on whether the listing agreement the parties signed was an exclusive agency agreement or an exclusive right-to-sell agreement. Because he was not the procuring cause of the sale to ATC, ATEC would be liable to Rogier only under the latter.<sup>82</sup>

In deciding on the nature of the listing agreement, the court of appeals “look[ed] to the particular language of the contract.”<sup>83</sup> The court applied “well-settled principles of contract interpretation” to that language “as with any other contract.”<sup>84</sup> Finding no ambiguity in the contract language, the court of appeals sought to apply the contract as the parties had agreed, especially the language in paragraph six. That paragraph provided first that Rogier was “the exclusive agent with and exclusive listing.” This language supports the existence of an exclusive agency agreement but does not grant an exclusive right to sell. For that right to have been conferred on Rogier, it would have to be found in the remaining language in paragraph six, which provided that “all prospective buyers shall send copies of all correspondence and purchase offers to [ATEC] and to [Rogier].”

The court of appeals concluded that the “plain and ordinary meaning” of this clause was that “Rogier shall be informed of and shall participate in negotiations with *all* prospective buyers, without exception and regardless of how they were procured.”<sup>85</sup> Because ATEC had agreed to involve Rogier in negotiations with all prospective buyers, the court of appeals concluded that it had relinquished its right to exclude him from negotiations with any buyer, which had the effect of conferring on Rogier an exclusive right to sell and of depriving ATEC of the ability to sell its business on its own. Once exclusive sale rights were found in Rogier, he no longer needed to be the procuring cause of a sale to earn a commission.<sup>86</sup>

The *Rogier* opinion confirms the validity of exclusive right-to-sell listing agreements and reaffirms the rule that for a commission to be deemed earned under such an agreement, the broker need not have been the procuring cause of the sale. Accordingly, the law gives a specialized meaning to the word “earn.” Taken together, *Rogier* and *Samar* provide reassurance to brokers that once a

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81. *Id.*

82. The court of appeals concluded that Rogier could not recover damages from ATEC from his inability to make a sales presentation to Baker, and thereby earn an immediate two percent commission, because such damages were not foreseeable at the time Rogier and ATEC entered into their listing agreement. The terms of the Rogier—Baker agreement differed significantly from the terms of the Rogier—ATEC agreement, and ATEC would have had no way at the time of contracting with Rogier that its actions would have resulted in a loss to him under a contract to be executed in the future with an unknown party. *See id.* at 613-14.

83. *Id.* at 616.

84. *Id.*

85. *Id.* (emphasis in original).

86. *See id.*



commission has been earned, as defined in the listing agreement, sellers are not likely to escape the obligation to pay.

The remainder of the *Rogier* opinion considered whether the exclusive right-to-sell agreement was "otherwise valid" in light of challenges raised by ATEC based on uncertainty of duration, lack of mutuality of obligation, lapse due to passage of time, and waiver. While the opinion contains a good review of the rules pertaining to each of these issues, the waiver arguments are interesting because they raise questions about the nature of disclosure that a broker must make to a seller concerning the exclusive right to sell clause and about the nature of the understanding by the seller of the impact of that right on the seller's ability to sell his property on his own.

ATEC argued that Rogier waived any exclusive right to sell because he never "discussed" the exclusivity of their relationship with ATEC. The court of appeals rejected this argument by stating that "[i]rrespective of what Rogier 'discussed' with ATEC, the clear and unambiguous language of their exclusive listing agreement conferred upon him an exclusive and unequivocal right to sell ATEC's business."<sup>87</sup> This conclusion exemplifies often taken by the law in transactions involving commercial parties. In such transactions, the parties are presumed to be able to protect themselves and are not thought to need any extra assistance from the law. This presumption does not apply to transactions involving individuals, and the law often requires that certain contract terms be brought to the special attention of individuals, such as requiring the term to be printed in conspicuous type or by requiring the term to be typed on a separate paper that must then be signed by the individual.<sup>88</sup> It could reasonable be presumed that ATEC, a business worth "eight figures," was guided by sophisticated managers. Can the same assumption always be made whenever a business is a party to a listing agreement? Are individuals who form a closely held corporation as their first business venture or to operate a "mom and pop" company automatically vested on commencing business with sophistication? Under the right facts in a future case a reasonable argument could be made that a broker should be required to make some degree of disclosure and discussion of the nature and effect of an exclusive right-to-sell agreement to the seller for that agreement to be enforceable.

### III. LANDLORD-TENANT RELATIONS

The field of landlord-tenant relations law was dominated in 1999 by the Indiana Supreme Court's decision in *Johnson v. Scandia Associates, Inc.*,<sup>89</sup> in which the court held that a warranty of habitability to support a personal injury action could not be implied as a matter of law into all residential real estate

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87. *Id.* at 620.

88. *See, e.g.*, IND. CODE §§ 32-15-7-9 and 24-5-11.5-13 (2000) (stating the requirements for waiver of implied warranties in new home construction and improvement of exiting homes).

89. 717 N.E.2d 24 (Ind. 1999).



leases.<sup>90</sup> *Johnson*, which was reviewed and analyzed in the 2000 survey issue of this law review,<sup>91</sup> considered the proper roles of tort law principles and contract law warranty principles in residential leases. The supreme court refused to imply a warranty of habitability into all residential leases because it considered such a warranty to be a creature of contract and contract terms must be based on agreement of the parties. Although the court acknowledged that a warranty of habitability could arise by express agreement, or could be implied in fact by course of dealing or ordinary practices in the trade, it refused to otherwise imply a warranty.<sup>92</sup> The court concluded that to do so would violate the contract law principle that “[c]ontracts are private, voluntary allocations by which two or more parties distribute specific entitlements and obligations” and would impose an involuntary risk distribution more appropriate under tort law.<sup>93</sup>

One appellate opinion issued during this survey period, *Zawistoski v. Gene B. Glick Co., Inc.*,<sup>94</sup> continues the debate over the place of implied warranties in residential leases. Two other cases, *City of Indianapolis Housing Authority v. Pippin*<sup>95</sup> and *Schoknecht v. Hasemeier*,<sup>96</sup> address two additional landlord-tenant issues: premises liability in tort for landlords for personal injuries sustained by tenants at the hands of third-party non-residents and landlord compliance with Indiana’s Security Deposits statute.<sup>97</sup>

*A. Breach of Warranty Claims: Zawistoski v. Gene B. Glick Co., Inc.*<sup>98</sup>

*Zawistoski* implements and reinforces the analysis, originating in the supreme court’s opinion in *Johnson v. Scandia Associates, Inc.*,<sup>99</sup> of the inapplicability of breach of warranty theory to claims filed against landlords by lessees of residential real estate for personal injuries sustained on the leased property.<sup>100</sup> The facts of the *Zawistoski* case are relatively simple. In 1991, Zawistoski and Glick entered into a lease agreement for an apartment in a complex in Bloomington, Indiana. Glick had advertised the apartment complex as designed for individuals sixty-two years of age and older and as accessible for individuals with disabilities or limited mobility. After residing in the complex for six years, Zawistoski tripped on a raised portion of a sidewalk in a common area and sustained a fractured neck.

Zawistoski sued Glick and asserted claims based on negligence and breach

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90. See *id.* at 32.

91. See Wilson, *supra* note 4, at 1447-52.

92. See *Johnson*, 717 N.E.2d at 31.

93. *Id.* at 29.

94. 727 N.E.2d 790 (Ind. Ct. App. 2000).

95. 726 N.E.2d 341 (Ind. Ct. App. 2000).

96. 735 N.E.2d 299 (Ind. Ct. App. 2000).

97. See IND. CODE § 32-7-5-14 (2000).

98. *Zawistoski*, 727 N.E.2d at 790.

99. 717 N.E.2d 24 (Ind. 1999).

100. See *Zawistoski*, 727 N.E.2d at 791.



of contract. She later amended her complaint to add a breach of warranty count. Glick moved for summary judgment on the breach of warranty and breach of contract claims. The trial court granted Glick's motion, concluding that the lease agreement did not create an express warranty that Glick would ensure that the common areas were in a safe condition.<sup>101</sup> After Glick prevailed on the negligence claim at trial, Zawistoski appealed the grant of Glick's motion for summary judgment on the breach of warranty and breach of contract claims.<sup>102</sup>

Zawistoski's breach of warranty claim was based on her theory that a provision of the lease agreement created an express warranty. Alternatively, she argued that an express warranty was created by the content of Glick's promotional advertisements. The lease provision in which Zawistoski saw an express warranty was paragraph 10(a), which stated: "The Landlord agrees to . . . maintain the common areas and facilities in a safe condition."<sup>103</sup> The court of appeals concluded that this lease provision simply restated the existing common law that a "landlord has a duty of reasonable care that the common ways and areas are maintained in a reasonably fit and safe condition."<sup>104</sup> The court of appeals contrasted this duty with the duty imposed by a warranty, which is "a promise relating to a past or existing fact that incorporates a 'commitment by the promisor that he will be responsible if the facts are not as manifested.'"<sup>105</sup> The court of appeals found the existence of a warranty commitment that defects will never exist to be inconsistent with other provisions of the lease, such as provisions that imposed on tenants a duty to report the existence of defects and that imposed on Glick the obligation to make necessary repairs.<sup>106</sup> Such provisions have meaning only if paragraph 10(a) is read as a restatement of the common law rule.

The court of appeals also rejected Zawistoski's argument that Glick's advertisements referring to the apartment complex as accessible for the elderly created an express warranty by stating that there was no evidence that she did not receive the benefit of the advertised amenity or that she gave any consideration for it.<sup>107</sup> Zawistoski had, after all, been content with the amenities of the apartment complex as, by the time of her accident, she had renewed her lease to reside there for a total of six years.

*Zawistoski* is perhaps as noteworthy for the line of reasoning it uses, and the line of reasoning it rejects, as for its result. The tenant in *Johnson* urged the supreme court to imply a warranty of habitability into leases for residential property. The supreme court refused to imply such a warranty and relied on an analysis that viewed a lease in the same manner as any other contract and viewed obligations voluntarily assumed by agreement of the parties as the heart of a lease

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101. See *id.* at 792.

102. See *id.*

103. *Id.* at 793.

104. *Id.*

105. *Id.* (quoting *Johnson v. Scandia Assocs., Inc.*, 717 N.E.2d 24, 28 (Ind. 1999)).

106. See *id.*

107. See *id.* at 794.



contract.<sup>108</sup> The supreme court acknowledged that warranties could arise with regard to residential leases but said they would have to be expressly stated or be implied from the landlord's conduct.<sup>109</sup>

Zawistoski tried to argue that a lease provision created an express warranty. The court of appeals, in its analysis of that claim, signaled an emphasis on the presence of an express bargained-for agreement between the parties. This emphasis, which is consistent with the supreme court's analysis in *Johnson*, means that express warranties in residential leases will have to be clearly stated to be enforceable and that such warranties will not be found to exist by inference from ambiguous or non-specific lease terms.

*B. Determining the Scope of a Landlord's Duty of Care:*  
*City of Indianapolis Housing Authority v. Pippin*<sup>110</sup>

In *Pippin*, the court of appeals was called upon to determine the scope of a landlord's duty to use reasonable care to protect a tenant from harm in the common areas of residential apartment complexes. In deciding the case, the court of appeals rejected a narrow view of a landlord's duty that would impose liability only where the events that actually occurred were themselves foreseeable and instead utilized a broader view of duty that permits liability to be imposed when a category of events, which includes the events that actually occurred, was foreseeable.<sup>111</sup>

The City of Indianapolis Housing Authority (Housing Authority) operated a residential apartment complex and the Pippin family occupied one of the apartments in the complex. One day, fourteen-year-old Angela Pippin was playing basketball with friends at a portable basketball goal set up in the area of the apartment complex that was paved for vehicular traffic. On that same day, a twelve-year-old boy used a screwdriver to start an abandoned car that had been left in the apartment complex parking lot. The boy lost control of the car and struck several children, including Angela who died from her injuries. Angela's parents filed a wrongful death suit against the Housing Authority. They alleged that the Housing Authority was negligent in failing to provide a safe area for resident children to play and in failing to address a persistent problem of stolen vehicles being abandoned on the property.

The Housing Authority filed a motion for summary judgment contending that as a matter of law the Pippins could not establish that it owed any duty to Angela and that its actions were not the proximate cause of her death. The trial court denied the Housing Authority's motion, and the case was tried to a jury.<sup>112</sup> At the close of the Pippins' case, the Authority moved for judgment on the evidence,

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108. See *Johnson*, 717 N.E.2d at 29.

109. See *id.* at 30-31.

110. 726 N.E.2d 341 (Ind. Ct. App. 2000).

111. See *id.* at 346.

112. See *id.* at 344.



which was denied.<sup>113</sup> The jury found in favor of the Pippins and awarded \$163,000 in damages.<sup>114</sup> The Housing Authority appealed.

The court of appeals began its analysis by reaffirming basic principles of tort law. It restated the fundamental position of duty in tort analysis by noting that “[a]bsent a duty owed to a plaintiff by the defendant, there can be no actionable negligence,” and that “[w]hen found to exist, the duty is to exercise reasonable care under the circumstances.”<sup>115</sup> This duty “never changes,” but “the standard of conduct required to meet that duty varies based on the circumstances.”<sup>116</sup> Determining of the existence of a duty in a particular case requires a court to “balance three factors: 1) the relationship between the parties; 2) the reasonable foreseeability of harm to the person injured; and 3) public policy concerns.”<sup>117</sup>

The first factor was easily established because the Pippins had lived in the apartment complex for approximately four years prior to the events that resulted in Angela’s death. As a result of the landlord-tenant relationship, the Housing Authority had “a duty of reasonable care to see that the common areas or areas under [its] control [were] reasonably fit.”<sup>118</sup> This factor, the court concluded, weighed in favor of finding a duty on the part of the landlord to protect Angela from harm when she used the basketball goal.<sup>119</sup>

With regard to the foreseeability of harm, the Housing Authority argued that it was not foreseeable that a twelve-year-old boy would use a screwdriver to start a stolen car and then lose control of that car and cause injury. The court of appeals said that the Housing Authority’s view of both the identity of the plaintiff and the nature of the harm was too “cramped.”<sup>120</sup> A more appropriate view of the foreseeability factor “requires a general analysis of the broad type of plaintiff and harm involved, without regard to the facts of the actual occurrence.”<sup>121</sup> Here, that broad analysis would be whether it was foreseeable that a child (not necessarily Angela) playing basketball at a goal erected and maintained by the Housing Authority in a paved area designed for vehicular traffic (not necessarily stolen vehicles) might be struck and injured by a vehicle (not necessarily driven erratically by a twelve-year-old boy). The conclusion, the court said, did not stretch the imagination and weighed in favor of the existence of a duty for the Housing Authority in this case.<sup>122</sup>

The court of appeals also found that public policy considerations supported imposing a duty on the Housing Authority in this case because such a duty would be consistent with existing notions of a landlord’s duty to use reasonable care to

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113. *See id.*

114. *See id.*

115. *Id.* at 345.

116. *Id.*

117. *Id.*

118. *Id.*

119. *See id.*

120. *Id.* at 346.

121. *Id.*

122. *See id.*



see that common areas under its control are reasonably fit.<sup>123</sup> Specifically, the court concluded that "[s]uch a duty would require all multi-family housing complexes to consider the safety of the areas in which resident children play."<sup>124</sup> For the court, all three factors used to determine the existence of a duty weighed in favor of finding a duty owed to Angela by the Housing Authority.

The court also found that the issue of proximate cause was appropriately left to the jury.<sup>125</sup> Foreseeability in the context of establishing proximate cause does not require that a similar act have occurred in the past to put the Housing Authority on notice that injury might occur in the future. Other circumstances in existence prior to a particular injury can be sufficient to support foreseeability. Here, such support came from the fact that the Housing Authority had control over the paved area where the basketball goal was located, that management of the apartment complex knew prior to Angela's death that the goal was in a paved area, and that the goal had been present in the paved area for several months. Unless only one conclusion can be drawn from such circumstances, the presence of proximate cause is a matter for the finder of fact and cannot be resolved on a motion for summary judgment.<sup>126</sup>

*C. Content and Purpose of the Security Deposits Statute's  
Notice Provisions: Schoknecht v. Hasemeier*<sup>127</sup>

In *Schoknecht*, compliance with landlord notice provisions of Indiana's Security Deposits statute<sup>128</sup> was at issue. This statute sets forth specific circumstances under which a landlord can retain money deposited by a tenant as a security deposit. A landlord may not deduct any sum from a security deposit that is not identified in section 13 of the statute.<sup>129</sup> Further, a landlord must mail to a tenant within forty-five days after the termination of the tenant's occupancy an itemized list of damages that the landlord claims may be deducted from the security deposit, "including the estimated cost for each damaged item and the amounts and lease on which the landlord intends to assess the tenant."<sup>130</sup> If the landlord complies with the statutory notice provision, he may "retain the tenant's security deposit and apply it towards 'the amount of damages that the landlord has or will reasonably suffer by reason of the tenant's non-compliance with the law or rental agreement.'"<sup>131</sup> If the landlord fails to comply with the notice provisions, the absence of notice "constitutes agreement by the landlord that no

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123. *See id.*

124. *Id.*

125. *See id.* at 346-47.

126. *See id.* The court of appeals used the same foreseeability analysis to reject the Authority's appeal of the denial of its motion for judgment on the evidence. *See id.* at 347-48.

127. 735 N.E.2d 299 (Ind. Ct. App. 2000).

128. IND. CODE § 32-7-5-14 (1989).

129. IND. CODE § 32-7-5-13 (1989).

130. *Schoknecht*, 735 N.E.2d at 302.

131. *Id.* (quoting IND. CODE § 32-7-5-12(a)(2) (1995)).



damages are due, and the landlord must remit to the tenant immediately the full security deposit.”<sup>132</sup> The purpose of the statute is to restrict a landlord’s set-off claims against a tenant’s security deposit to only those items approved by the legislature and to provide for a timely return of the tenant’s deposit if none of the approved uses is present.

Schoknecht, the landlord, and Hasemeier, the tenant, entered into a lease agreement for residential property, which included a \$750 security deposit. Landlord claimed that tenant subsequently defaulted by committing waste on the property and by failing to make lease payments when they became due. Landlord became entitled to possession of the leased property on May 1, 1997, by virtue of a judgment entered on a complaint for damages that the landlord had filed against tenant. On June 12, tenant requested the return of her security deposit. Landlord replied on June 13 by letter in which landlord claimed damages in excess of the amount of tenant’s security deposit. Landlord’s letter contained an itemized list of damages and the estimated cost of repair.

Following procedural maneuverings not relevant to the issue raised on appeal, tenant filed a motion for summary judgment against landlord’s damages claim. Tenant argued that landlord’s June 13 letter failed to comply with the notice requirements of the Security Deposits statute because it contained damages that landlord was not legally entitled to deduct from tenant’s security deposit. The trial court granted tenant’s motion, and landlord appealed.<sup>133</sup>

Landlord liability for failure to comply with the notice requirements of the statute arises: where “1) that landlord erroneously calculates the tenant’s damages, 2) the tenant resorts to legal action to collect all or part of his deposit, and 3) the tenant was entitled to a return to a refund of all or part of the tenant’s deposit.”<sup>134</sup> Hasemeier argued that Schoknecht failed to comply with the statute because the notice letter contained items that the landlord was not entitled to deduct and he failed to substantiate the estimated costs of repair. Accordingly, the court of appeals was required to decide what content of a notice letter is sufficient to satisfy the statutory requirements.<sup>135</sup>

In determining that Schoknecht’s June 13 letter did not violate the security deposits statute, the court of appeals noted that the statute applies only to claims made against security deposits and that Indiana Code section 32-7-5-12(c) does not preclude a landlord from asserting other claims against a tenant.<sup>136</sup> The court concluded that landlord had a right, under the terms of the lease agreement, to seek recovery for items that could not be recovered under the statute and that the landlord did not violate that statute by including the contractually permitted items with the statutorily permitted items in one letter.<sup>137</sup> In other words, the notice letter content requirements of Indiana Code section 32-7-5-14 do not

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132. *Id.* (quoting IND. CODE § 32-7-5-15 (1989)).

133. *See id.*

134. *Id.* (citing *Rueth v. Quinn*, 659 N.E.2d 684, 689 (Ind. Ct. App. 1996)).

135. *See id.* at 302-03.

136. *See id.* at 303.

137. *See id.*



require that a letter be sent for purpose of statutory compliance only, to the exclusion of other matters pertaining to the landlord-tenant relationship.

Consistent with this reasoning, the court of appeals concluded that inclusion of items of alleged damage outside the scope of the statute could not constitute an erroneous calculation of damages to meet the test developed in *Reuth*.<sup>138</sup> Further, the court stated that there was no requirement for the landlord to separate the damages within the scope of the statute from those outside its scope.<sup>139</sup> Finally, the court rejected tenant's claim that landlord's letter did not comply with the statute because it failed to substantiate the alleged damages. The court concluded that the statute does not require a landlord to substantiate his damages; it only requires him to itemize the damages and estimate the cost of repair.<sup>140</sup> Substantiation of those items is a matter left for trial.

*Schoknecht* makes it clear that the notice requirements of the security deposits statute are intended merely to make a tenant aware that the landlord is asserting a claim against tenant's security deposit. That notice must be specific enough to set forth an itemized list of damages and an estimated cost of repair for each, but the substantive rights of the parties under the lease, the factual support or lack of factual support for claims asserted, and the substantiation of damage amounts are left for further proceedings.

#### IV. PREMISES LIABILITY OF LANDOWNERS TO THE PUBLIC

*Miles v. Christensen*<sup>141</sup> is closely related to *Pippin*, in that both cases involved premises liability for owners of real estate and the establishment of limits of that liability based upon foreseeability analyses. However, *Pippin* occurred in the context of an on-going landlord-tenant relationship with the plaintiff's injury occurring on the defendant's land, whereas *Miles* considered a landowner's liability to the public at large for injuries that occurred off the landowner's land on an adjoining roadway. The court of appeals in *Miles* refused to approve a foreseeability test based solely on the status of the land as urban or rural but instead made the intensity of the use of roads abutting the real estate just one factor in a broader test of foreseeability of harm to users of that road.<sup>142</sup>

The court identified one issue on appeal: "whether owners of rural land abutting a public road owe a duty to care for or remove decaying or dead trees located on their land so as to protect people traveling on the public highway."<sup>143</sup> The Mileses owned land abutting a state highway approximately one mile east of the City of Peru. On March 13, 1995, twenty-one-year-old Jason Christensen rode his motorcycle on that highway and a dead elm tree, which was located on

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138. *See id.*

139. *See id.*

140. *See id.*

141. 724 N.E.2d 643 (Ind. Ct. App. 2000).

142. *See id.* at 646.

143. *Id.* at 644.



the Mileses' land fell and struck him. Jason died as a result of the injuries he sustained. Apparently "the tree had been dead for years and was visible from the perimeter of the property."<sup>144</sup>

Jason's parents filed a wrongful death action against the Mileses, alleging that the Mileses were "negligent in failing to maintain their real estate in a reasonably safe condition and in failing to inspect their land and correct the danger caused by dead or dying trees."<sup>145</sup> The Mileses filed a motion for summary judgment contending that they owed no duty to Jason and therefore could not be liable for his death. The trial court denied the Mileses' motion, and they appealed.<sup>146</sup>

The starting point for the court of appeals in analyzing what duty, if any, a landowner has with regard to trees and other natural conditions of his land, was the Indiana Supreme Court's opinion in *Valinet v. Eskew*.<sup>147</sup> *Valinet* noted the "general rule of nonliability [of landowners] for natural conditions on land"<sup>148</sup> and explained the modifications made to that rule over time. The general rule was said to have arisen at a time when land was largely unsettled and, absent actual knowledge of a dangerous natural condition, "the burden imposed on a landowner to inspect it for safety was held to exceed the societal benefit of preventing possible harm to passersby."<sup>149</sup> Later, a rule evolved that imposed a duty to inspect on landowners in more heavily populated areas, in an attempt to prevent unreasonable risk of harm to persons using the roadway. The rationale for this rule was that "the risk of harm to highway users is greater and the burden of inspection on landowners is lighter in such populated areas."<sup>150</sup> As a result, the *Valinet* court approved "differing duties placed on owners of land with respect to differing demographics."<sup>151</sup>

For the Mileses, the distinction between "differing demographics" became rigidly compartmentalized into two classifications, urban versus rural. The Mileses found support for their argument in section 363 of the Restatement (Second) of Torts,<sup>152</sup> which distinguishes between "urban" and other kinds of land and "imposes liability for harm only when the land is urban in nature."<sup>153</sup>

The majority opinion in *Miles*<sup>154</sup> rejected an analysis of landowner liability based on an urban versus rural distinction on two grounds. First, the court of appeals found no language in *Valinet* indicating that a determination of a

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144. *Id.* at 645.

145. *Id.*

146. *See id.*

147. 574 N.E.2d 283 (Ind. 1991).

148. *Miles*, 724 N.E.2d at 645 (quoting *Valinet*, 574 N.E.2d at 285).

149. *Id.* (quoting *Valinet*, 574 N.E.2d at 285).

150. *Id.* (quoting *Valinet*, 574 N.E.2d at 285).

151. *Id.* (quoting *Valinet*, 574 N.E.2d at 285).

152. RESTATEMENT OF TORTS (SECOND) § 363 (1965).

153. *Miles*, 724 N.E.2d at 646.

154. Judge Mattingly wrote the opinion for the court and was joined by Judge Bailey. Judge Baker concurred in the result and wrote a separate, brief opinion.



landowner's duty depends solely on this distinction. In fact, the court determined that "*Valinet* calls for a more sophisticated analysis of the duty question, requiring a consideration of factors such as traffic patterns and land use in the relevant area."<sup>155</sup> The court found that the urban-rural distinction merely provides a starting point for analysis.<sup>156</sup>

Second, the court of appeals examined the public policy considerations implicated in the scope of duty question.<sup>157</sup> The court noted the extended network of developed roadways in Indiana and the pervasiveness of motor vehicle travel, two factors that combine to expose "a significant portion of the public . . . to danger insofar as natural conditions of property may menace travelways and threaten the passage of motor vehicles."<sup>158</sup> As such, the court concluded, "sound public policy dictates that 'in light of our increasingly mobile society, highways must be kept free from obstructions and hazards.'"<sup>159</sup> Implementing this policy required recognizing a rule that a "landowner may, under certain circumstances, owe a duty of reasonable care as to those who, while outside of the land, suffer harm from the land's natural conditions."<sup>160</sup>

Against this backdrop, the court of appeals engaged in a foreseeability analysis that focused on the location of the property adjacent to a road suitable for public travel and the expectation of regular public "visitation" on the road. These factors create "a duty [of landowners] to care for or remove natural conditions such as a decaying or dead tree located on their land so as to protect those who might be traveling on the road."<sup>161</sup> The court concluded that whether the *Miles*es breached that duty was a question for the jury to decide.

There are two notable features about *Miles*. The first is its demonstration of the need to look behind the labels sometimes developed by courts, or drafters of resources like the Restatement, in creating "tests" that are often embodied in legal rules. Such tests, like the urban-rural test discussed in *Miles*, are useful as shorthand expressions of more complicated thought processes, but there is a danger that, over time, the tests can take on a life of their own and can supplant the analysis that they describe. *Miles* is a useful reminder to guard against such "shortcut" thinking.

Second, *Miles* demonstrates the common law at its best as the case shows the ability of the common law to adapt to changed conditions while still remaining faithful to the case law reasoning process. The urban-rural distinction originated at a time when traffic on roadways was less prevalent than today, both in terms of the sheer number of developed roadways and various types of motor vehicles and drivers on them. Even though the analysis of foreseeability in cases from a less mobile era may not seem particularly appropriate for modern society, the

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155. *Miles*, 724 N.E.2d at 646.

156. *See id.*

157. *See id.*

158. *Id.*

159. *Id.* (quoting *Fritz v. Parkinson*, 397 N.W.2d 714, 715 (Iowa 1986)).

160. *Id.*

161. *Id.* at 647.



rule of foreseeability has remained unchanged. The only thing that has changed is the circumstances that fit the rule. A quote from Justice Benjamin Cardozo's classic opinion in *McPherson v. Buick Motor Co.*<sup>162</sup> is readily applicable to the *Miles* decision. Justice Cardozo wrote:

Precedents drawn from the days of travel by stage coach do not fit the conditions of travel today. The principle that the danger must be [foreseeable] does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.<sup>163</sup>

As recognized by scholars like Pound, such adaptability and adherence to that precedent is the "chief cause of success" of the common law, and the process is evident in *Miles*.<sup>164</sup>

## V. ISSUES AFFECTING MORTGAGEES

The duties and liabilities of mortgagees in three different situations were the subject of appellate court opinions during the survey period. The first case considered the extent of a mortgagee's duty to protect a material supplier's interest in being paid for work performed in constructing a house when the mortgagee controlled the disbursement of funds at a loan closing. The second case dealt with the order in which a foreclosing mortgagee must pursue its collection remedies against the mortgagor. The third case addressed the effect of a mortgagor's redemption rights on a bona fide purchaser who bought the mortgaged property at a public foreclosure sale after the debtor had redeemed.

### A. Scope of a Mortgagee's Duty to Protect Interests of Third Parties:

*Town & Country Homecenter of Crawfordsville, Indiana, Inc. v. Woods*<sup>165</sup>

*Town & Country Homecenter* is an interesting case for several reasons. First, it struggles with the existing law concerning the presence or absence of a duty on the part of a mortgage lender to protect third party material suppliers who have an interest in the mortgaged real estate because they have not been paid when that lender conducts the loan closing. Second, it contains a majority opinion, a concurring opinion that decries the result the author feels compelled to follow by virtue of Indiana Supreme Court precedent, and a dissenting opinion that decries the result and finds a way to interpret existing precedent to allow a decision contrary to the one reached by the majority. Each of the three opinions has differing views about the creation of duties between the parties.

In *Town & Country Homecenter*, Lynn Fellows executed a contract with Ronald Woods for Woods to build a house for Fellows.<sup>166</sup> Fellows paid \$10,000

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162. 111 N.E. 1050 (N.Y. 1916).

163. *Id.* at 1053.

164. POUND, *supra* note 3, at 182.

165. 725 N.E.2d 1006 (Ind. Ct. App. 2000).

166. *See id.* at 1008.



to Woods and applied for a mortgage with National City Bank (NCB) for the balance of the construction cost, which was to be paid at closing. Woods purchased building materials from Town & Country Homecenter of Crawfordsville, Indiana, Inc. (Town & Country). Fellows subsequently received a pre-lien notice letter from Town & Country which stated that Town & Country could file a lien against Fellows' property if it did not receive payment for the materials it supplied. Fellows brought the pre-lien notice letter to the attention of the NCB representative handling the mortgage. The representative told Fellows that similar situations arose "all the time" and that Town & Country's letter would be addressed at closing. Those statements by NCB's representative form the heart of the legal issues considered by the appellate court.

The closing on Fellows' house occurred about three weeks after the date of Town & Country's pre-lien notice letter. During that time, no one from Town & Country communicated with anyone at NCB. At the closing, NCB's representative asked Woods about the existence of any liens against the property. Woods acknowledged the existence of a mortgage against the property and confirmed that he had not completed payment of money owed to Town & Country for materials it had supplied to the project. Woods stated, however, that he would pay Town & Country from the check he would receive from the closing.

The NCB representative then required Woods to sign a vendor's affidavit stating that "there were no liens on the property and that there were 'no unpaid claims for labor done upon or materials furnished for the real estate in respect of which liens have been or may be filed,'"<sup>167</sup> even though the representative knew both statements to be untrue. NCB then issued one check to the existing mortgagee to extinguish its lien and one check in the amount of \$59,229.17 payable solely to Woods. No other provision was made for sums owed to Town & Country.

Approximately two months later, Town & Country filed a mechanic's lien against Fellows' property and alleged that it was owed \$32,866.12 for materials supplied to construct Fellows' house. Just short of a year later, Town & Country filed a complaint to foreclose on its mechanic's lien. The lien was later released because Town & Country did not provide the statutorily-required pre-lien notice letter to Fellows within the time required by statute. A trial was conducted on Town & Country's non-mechanic's lien claims, including a claim that it was a third-party beneficiary of the mortgage agreement between Fellows and NCB. The trial court considered evidence submitted by stipulation and in the form of deposition testimony and entered judgment against Town & Country and in favor of NCB.<sup>168</sup> Thereafter, Town & Country appealed.<sup>169</sup>

Town & Country's third-party beneficiary claim was based on its contention that NCB had a fiduciary duty to exercise reasonable care to see that Town & Country was paid and that NCB breached that duty when it disbursed loan

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167. *Id.* at 1003 (quoting Record at 141-42).

168. *See id.*

169. *See id.*



proceeds to Woods with the knowledge that Woods had not paid Town & Country. The court of appeals' analysis of this argument began with a recitation of the generally accepted elements of a third-party beneficiary claim. These elements are:

- (1) A clear intent by the actual parties to the contract to benefit the third party;
- (2) A duty imposed on one of the contracting parties in favor of the third party; and
- (3) Performance of the contract terms is necessary to render the third party a direct benefit intended by the parties to the contract.<sup>170</sup>

The court, in a majority opinion written by Judge Baker, concluded that the statement of NCB's representative to Fellows that Town & Country's pre-lien notice letter would be addressed at closing, was not a promise to Town & Country that it would be paid.<sup>171</sup> At most, the court considered this statement to be a promise to Fellows to protect *his* interest, an interest which was in fact protected when NCB's representative secured Fellows' consent to distribute funds to Woods even though Town & Country had not been paid.<sup>172</sup> The court of appeals similarly rejected both the existence of any clear intent to benefit Town & Country and Town & Country's creditor beneficiary theory.<sup>173</sup>

Finally, the court of appeals also rejected Town & Country's argument that existing Indiana case law creates a duty for NCB to protect Town & Country's interests. The case relied upon by Town & Country, *Prudential Insurance Co. of America v. Executive Estates, Inc.*,<sup>174</sup> concerned only the liability of the mortgagee to the mortgagor and not to third parties. Accordingly, the *Town & Country* court held:

[W]e cannot find that a mortgage lender has a duty to oversee the repayment of all contractors and suppliers. Indeed, our supreme court held in *Executive Estates* that, generally, a lender has no obligation to protect even the interests of its borrower unless bound to do so by an agreement.<sup>175</sup>

Thus, the trial court did not err when it determined that NCB owed no duty to Town & Country.<sup>176</sup>

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170. *Id.*

171. *See id.*

172. *See id.* Fellows also suffered no harm by NCB's actions because Town & Country's mechanic's lien was declared invalid because it was not timely filed. *See id.* at 1010.

173. *See id.*

174. 369 N.E.2d 1117 (Ind. App. 1977).

175. *Town & Country Homecenter*, 725 N.E.2d at 1010.

176. *See id.* The court of appeals also used the absence of any relationship between NCB and Town & Country to reject the latter's constructive fraud claim against NCB. *See id.* The court identified the first element of constructive fraud as including "a duty existing by virtue of the relationship between the parties." *Id.* at 1011. Finally, the court rejected Town & Country's



In a separate opinion concurring in the result, Judge Sullivan analyzed the "incongruity" of the state of the law that would relieve NCB from liability for its conduct that led to "clearly foreseeable harm to a known and totally innocent party."<sup>177</sup> Judge Sullivan also included *dicta* in footnotes to his opinion that will undoubtedly resurface in a future case with the right fact pattern.<sup>178</sup>

Judge Sullivan used strong language to express his contempt for the conduct of NCB's representative, calling such conduct reprehensible, indefensible, and "a total disregard for the interests of persons known to have an interest in the proceeds of the real estate closing."<sup>179</sup> Judge Sullivan, however, saw his power to address the injustice done to Town & Country limited by the Indiana Supreme Court's decision in the analogous case of *McAdams v. Dorothy Edwards Realtors, Inc.*<sup>180</sup> In that case,

our Supreme Court held that a real estate agent, responsible for disbursing trust account funds following a real estate closing, was not liable to the purchaser for negligent disbursement resulting in failure to extinguish a lien because the real estate broker was the agent of the seller and therefore owed no duty to the purchaser.<sup>181</sup>

Despite the holding of *McAdams*, Judge Sullivan found in that case "the seeds for reviewing and revising the law as to the matter of liability in real estate closing situations."<sup>182</sup> Rather than viewing the realtor in charge of the closing in *McAdams* as simply serving as the agent of the seller, and thus owing no duty to the buyer, Judge Sullivan quoted approvingly a characterization of the closing process contained in a prior survey volume of this law review which viewed the agent as "the moving force in the real estate closing."<sup>183</sup> If removed from the restrictions of strict agency law principles, the actions of a person who undertakes to conduct a closing involving parties with differing interests could, for Judge Sullivan, be evaluated by standard tort principles.<sup>184</sup> Thus, liability would be judged on the existence of a duty that is created by foreseeability of the harm. For purposes of this case, "NCB's breach of its duty to Fellows may be said to give rise to tort liability for the negligent disbursement of funds with regard to the persons who would be foreseeably injured by such negligence."<sup>185</sup> Twice in his concurring opinion Judge Sullivan calls for the issue to be

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criminal deception claim against NCB on the ground that Indiana Code section 35-43-5-3(a) requires misapplication of entrusted property, which did not exist in this case because the mortgage proceeds were NCB's own funds and were not funds entrusted by another. *See id.*

177. *Id.* at 1012 (Sullivan, J., concurring).

178. *See id.* at 1012 nn.5-6.

179. *Id.* at 1013.

180. 604 N.E.2d 607 (Ind. 1992).

181. *Town & Country Homecenter*, 725 N.E.2d at 1013 (Sullivan, J., concurring).

182. *Id.* at 1014.

183. *Id.* at 1013 (citation omitted).

184. *See id.*

185. *Id.*



“revisited” and for the Indiana Supreme Court to “reopen the matter and resolve it in a manner not unfair to any party to such financial and fiduciary transactions.”<sup>186</sup>

Judge Staton dissented from the majority’s result and issued a separate opinion. Judge Staton did not see the court’s analytical options of a duty as limited to agency principles. He noted that “‘courts will find a duty where . . . reasonable persons would recognize it and agree that it exists,’”<sup>187</sup> and he found the source of that duty in traditional tort principles. Using the same three factor balancing test used by the court in *Pippin* discussed above, Judge Staton looked to “the relationship of the parties,” “the reasonable foreseeability of the harm,” and “public policy concerns”<sup>188</sup> to determine whether NCB in its function as loan closer owed a duty to Town & Country as an unpaid material supplier.

With regard to the existence of a relationship, Judge Staton noted that “[a] relationship that gives rise to a duty does not necessarily have to emanate from a contract.”<sup>189</sup> Non-contractual duties can arise depending upon the nature of the parties’ relationship and the knowledge possessed by the party accused of negligence.<sup>190</sup> In this case, NCB clearly had knowledge that Woods had not been paid, and that knowledge was relevant to a loan closing where the borrower’s funds are to be used to pay for construction of the house for the borrower. In such a context, Judge Staton found it to be a departure from custom and practice to disburse loan proceeds to a general contractor without making provision for payment to unpaid material suppliers.<sup>191</sup> Accordingly, there was a relationship between the parties that weighed in favor of finding a duty.

With regard to the foreseeability of harm factor, Judge Staton concluded that both the type of harm and the identity of the harmed party were foreseeable to NCB. The identity of the harmed party was actually known to NCB as a result of Town & Country’s pre-lien notice letter to Fellows, which he brought to the attention of NCB’s loan officer, and as a result of the loan officer’s direct questions to Woods at closing. The type of harm, non-payment of the material supplier by Woods, was also foreseeable given that Woods did not pay Town & Country in a timely manner as construction progressed and NCB provided the opportunity for Woods to continue to avoid payment. Thus, the foreseeability of the harm component also weighed in favor of finding a duty owed by NCB.

Finally, Judge Staton concluded that a public policy interest would be furthered by finding a duty of care in this case for at least two reasons. First, NCB’s closing agent acted with “a total disregard for the interests of persons known to have an interest in the proceeds of the real estate closing.”<sup>192</sup> Second,

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186. *Id.* at 1014.

187. *Id.* (quoting *Gariup Constr. Co. v. Foster*, 519 N.E.2d 1224, 1227 (Ind. 1988)) (Staton, J., dissenting).

188. *Id.*

189. *Id.*

190. *See id.*

191. *See id.*

192. *Id.* at 1015.



NCB's conduct "flies in the face of well established custom and practice in the lending industry."<sup>193</sup> As closing agent, NCB was in the best position to prevent the harm that Town & Country suffered, and that harm would have been prevented if NCB had utilized standard construction loan techniques to insure the absence of liens. The simplest technique NCB could have employed at the loan closing to avoid harm would have been to issue a check payable jointly to Woods and Town & Country. Woods would not have been able to negotiate such a check on his own and could not have dissipated the funds without paying Town & Country. NCB would have incurred no burden in the process of preventing harm. Thus, the third component of foreseeability was also established to support the existence of a duty from NCB to Town & Country. Judge Staton would have reversed the decision of the trial court and remanded the case for a trial to determine breach of duty, proximate causation and damages.

The *Town & Country* case raises difficult questions about the circumstances in which it is appropriate to impose a duty of one party in favor of another. These questions certainly arise in the context of a purchase of real estate, as in *McAdams*, and in loan closings for the improvement of real estate, as here, but they can also arise in other multi-party contexts where the participants' interests differ and one party occupies a role that affects each of the others. The scope of the duty of the party in control of the closing has traditionally been limited by contract principles, with duties being found by express agreement, implied from conduct, or based on third-party beneficiary rules, or by agency principles, with duties limited to the principal-agent relationship. Judges Staton and Sullivan would add negligence principles as an additional source of duty.<sup>194</sup>

Is such a source of duty advisable? Why should NCB be charged with a duty to look out for the interests of anyone besides itself and its customer simply because it is the source of money that several people may wish to have access to? If one examines the parties involved in a typical loan closing, and the already existing means each has to protect its interests, the answers may not be immediately clear. The interest of the borrower is to receive the real estate and any improvements that may have been constructed thereon free and clear of all but permitted liens or claims and to have the loan proceeds used to achieve this result. The land owner (or buyer) can achieve this result in several ways. He can insist on a no-lien contract with the general contractor; he can insist that the general contractor post payment and completion bonds; he can insist on lien waivers from all laborers and material suppliers at the time of each progress payment and at final closing; he can insist on the issuance of check payable jointly to the general contractor and laborers or material suppliers; he can insist on a retainage to have resources on hand to pay unexpected claims. While each of these techniques will not be available in every case, the landowner does have the means to protect himself.

The lender's interest in insuring free and clear title to the real estate on which

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193. *Id.* (quoting *id.* at 1013 (Sullivan, J. concurring)).

194. Judge Staton also refers to "justifiable reliance" in the opening paragraph of his dissenting opinion. *Id.* at 1014.



it will hold a mortgage to secure repayment of the owner's promissory note is in many ways similar to the owner's interest. Often a lender will insist on one or more of the techniques described above even if the owner would be willing to forego them. A lender can also insist on a lender's policy of title insurance insuring against the existence of mechanic's liens. Such coverage may not be the easiest item to obtain, but it is available. In short, the lender too can protect its interests.

Material suppliers, like Town & Country, also have existing mechanisms to protect their interests. Initially, Town & Country, as vendor, had the ability to structure its credit relationship with Woods, as customer, in a way that protected Town & Country against a default by Woods. Even after credit was extended, Town & Country had several techniques to protect its interests. It could have requested an express agreement with NCB for jointly payable checks or for progress payments paid directly to it based upon appropriate documentation. Town & Country could have protected its interests by complying with the clear requirements of the mechanic's lien statute. It could have pursued Fellows under the owner's liability provisions of the mechanic's lien statute for any construction loan proceeds not yet disbursed to the general contractor. The issue of NCB's liability to Town & Country would never have arisen if Town & Country had not failed to implement every protective device available to it.

Such an individualistic interest view of a multi-party closing would lead to the conclusion that, absent the express representation by NCB's representative to Fellows that Town & Country's unpaid bills would be handled at closing, NCB had an interest in protecting only its own position and was not obligated to be concerned with the interest of other parties. It is this philosophical view that underlies the holding of the court in *Prudential Insurance Co. v. Executive Estates, Inc.*,<sup>195</sup> that "generally, a lender has no obligation to protect even the interests of its borrower unless bound to do so by an agreement."<sup>196</sup> If the parties' interests and obligations are to be evaluated in this manner, how can a lender have a duty to protect the interests of an unpaid material supplier if that lender has no duty even to its borrower?

As proposed by Judges Baker, Sullivan, and Staton, the time has come to broaden the scope of parties' duties beyond strictly private contract and agency arrangements and to acknowledge the existence of duties owed on the basis of social considerations instead. In this case, once NCB acquired actual knowledge that Town & Country had not been paid and NCB had the means to prevent harm, its duties ceased to be measured solely by its private interests in the loan transaction. It then acquired duties to a party with which it had no other interest other than a generalized interest in not causing harm to a foreseeable victim.

But what should NCB have done at the closing if Fellows had directed that the closing proceed as it did, with Town & Country unpaid and only with Woods' promise to pay Town & Country from the check he would receive at closing? If

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195. 369 N.E.2d 1117 (Ind. Ct. App. 1977).

196. *Town & Country Homecenter*, 725 N.E.2d at 1010 (citing *Prudential Ins. Co.*, 369 N.E.2d at 1123).



NCB had fully informed Fellows of the potential problems that could arise from paying loan proceeds solely to Woods and Fellows had still insisted that closing proceed, should we expect NCB to have refused to close? Such a situation does not differ in effect from the facts of the case as Fellows suffered no harm from any breach of duty NCB may have owed to him because Town & Country forfeited all of its claims against Fellows. The harm to Town & Country is no less foreseeable in the hypothetical situation, but to impose a duty on NCB in favor of Town & Country would pit the lender against the wishes of the only party to the closing with whom it has a direct relationship, the borrower, and would be so to benefit a party with whom it has no direct relationship and which has other self-protection devices at its disposal.

The individualistic view of a multi-party closing, in which each party, including the lender, has the means to protect its own interests and is expected to do so, and the social view, in which a lender may have duties to other parties quite apart from its self-interests in the deal, can be reconciled if the lender's foreseeability based duties to others is restricted to circumstances in which the lender assumes the role of managing the closing. In effect, a lender that controls the closing of a construction loan voluntarily assumes two roles—lender and closing agent. These roles differ significantly, and the duties associated with each cannot be treated as coextensive. In a situation where the closing is conducted by a person or entity not a party to the deal, such as a title company representative, a lender's duties to others should continue to be measured by contractual agreement and agency principles. Third party interests can be protected by the independent closing agent. However, in a situation where the lender undertakes to conduct the closing, it should be compelled to look beyond its individual interests and to act in a manner that avoids the unreasonable risk of harm to foreseeable third parties. Evaluating a lender's duties in this way would both give effect to existing customs and practices of the construction and lending industries and prevent injustice arising from foreseeable harm to known and innocent parties.

*B. Sequencing Collection Remedies: National City Bank v. Morris*<sup>197</sup>

In *National City Bank*, the court of appeals reviewed rules relating to the relationship of collection mechanisms available to a mortgagee who has both an in rem foreclosure judgment against the debtor's property and an in personam judgment against the debtor individually. The facts of the case are convoluted and involve three mortgage foreclosure actions against the debtors' property and three complaints for money judgment against the debtors individually. After resolving an issue concerning standing of the various creditors, the court of appeals confronted a dispute between creditors National City Bank and Lovold, to whom National City Bank (NCB) had assigned an Equity Reserve Agreement and Mortgage that secured part of a judgment that NCB had obtained against the debtors. Subsequently, Lovold obtained an Agreed Judgment and Order of

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197. 717 N.E.2d 934 (Ind. Ct. App. 1999).



Foreclosure against the debtors. After filing a praecipe for a sheriff's sale, Lovold also obtained an Agreed Final Order of Garnishment, which subjected the debtors' wages to garnishment in Lovold's favor. NCB, which did not assign all of its claims against the debtors, filed a motion to have the garnishment order set aside on the ground that Lovold had not obtained a deficiency judgment because the foreclosure sale had not yet occurred. The trial court denied NCB's motion, and NCB appealed.<sup>198</sup>

The appellate court began its analysis of NCB's motion by stating:

The issue of whether the trial court was correct in denying NCB's motion to set aside the agreed garnishment order turns upon both an interpretation of certain sections of Title 32 dealing with the payment of debt where there is an express written agreement for the payment of money secured by a mortgage and an interpretation of the case law explicating these sections.<sup>199</sup>

The statutory provisions that the court said were implicated in this issue are Indiana Code sections 32-15-6-3, -6-5, -6-6, and -6-7.<sup>200</sup> These four statutes establish a procedure whereby: 1) in rendering a judgment of foreclosure courts shall give a personal judgment against any party, including the mortgagor, who may be "liable upon any agreement . . . for the payment of any sum . . . of money secured by the mortgage";<sup>201</sup> 2) the court shall order the mortgaged property "to be first sold before levy of execution upon other property of the defendant";<sup>202</sup> 3) the court shall order that the balance due on the mortgage and costs which may remain unsatisfied after the sale of the mortgaged premises "shall be levied on any property of the mortgage-debtor";<sup>203</sup> 4) the sheriff shall "forthwith proceed to levy the residue of the other property of the defendant" if any part of the judgment remains unpaid after sale of the mortgaged property;<sup>204</sup> and 5) "a creditor shall not [(a)] proceed to foreclose a mortgage while 'prosecuting any other action for the same debt or matter which is secured by the mortgage' or [(b)] 'prosecute any other action for the same matter' while foreclosing the mortgage or prosecuting a judgment of foreclosure."<sup>205</sup>

The trial court concluded that none of these statutory provisions were violated because the garnishment order sought by Lovold was supplemental or auxillary to the foreclosure action and, therefore, was not the "any other action" prohibited by section 32-15-6-7 nor was the garnishment action a levy of execution within the scope of section 32-15-6-3.<sup>206</sup> Accordingly, the trial court

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198. *See id.* at 935-36.

199. *Id.* at 936.

200. *See id.* at 936-37.

201. *Id.* at 937 (quoting IND. CODE § 32-15-6-3 (1998)).

202. *Id.* (quoting IND. CODE § 32-15-6-3).

203. *Id.* (quoting IND. CODE § 32-15-6-5).

204. *Id.* (quoting IND. CODE § 32-15-6-6).

205. *Id.* (quoting IND. CODE § 32-15-6-7).

206. *See id.* at 937-39.



concluded that it was proper for a creditor to seek an order of garnishment after it obtained an order of foreclosure but before the foreclosure sale had been completed and the amount of the deficiency, if any, was established.

The court of appeals found no error in the trial court's analysis of section 32-15-6-7. Instead it said that the "central issue" was "whether the legislature, in mandating in Ind. Code [section] 32-15-6-3 that the mortgaged property must be sold before 'levy of execution' on other property of the defendant, intended that the phrase of 'levy of execution' should include garnishment actions."<sup>207</sup> After reviewing the definitions of key terms and the supreme court's interpretation of predecessor statutes for evidence of legislative intent, the court of appeals concluded that "levy of execution" does include garnishment proceedings.<sup>208</sup>

The rationale for the court's decision in *National City Bank* is found in its reference to a trio of Indiana Supreme Court decisions issued between 1876 and 1898.<sup>209</sup> In each of these decisions, the supreme court held that other property of the debtor cannot be levied until after the foreclosure sale of mortgaged property is completed. Each court reasoned that until the foreclosure sale is completed the amount of deficiency to be collected by levy of execution is uncertain. The court of appeals in *National City Bank* concluded that the same need to determine the amount of a deficiency judgment applied to a creditor's use of garnishment proceedings and, therefore, such proceedings fall within the statutory prohibition against "levy of execution" in Indiana Code section 32-15-6-3 against.<sup>210</sup> Specifically the court of appeals said:

[O]nce a creditor obtains a judgment of foreclosure, it is necessary to wait until the sale and concomitant determination of the deficiency, if any, before levying on any other property. Thus, although a creditor may pursue both judgment on the note and a judgment of foreclosure at the same time, once she obtains a judgment of foreclosure, she may not execute upon any other property of the debtor until the foreclosure sale has occurred and a deficiency has been determined.<sup>211</sup>

Accordingly, the court of appeals held that the trial court erred in issuing a garnishment order before the foreclosure sale had occurred.

*National City Bank* recognizes the principle that property that has been pledged as collateral to secure repayment of a debt should be made to stand for that debt before other assets of the debtor are levied upon and in so doing raises at least indirectly the proper balance of powers between mortgagees and mortgagors. Indiana law suspends levy of execution only if the mortgagee first obtains a judgment of foreclosure. If the mortgagee decides to forego execution on the mortgaged property, he can pursue collection of a personal judgment by

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207. *Id.* at 938.

208. *Id.*

209. See *Mitchell v. Ringle*, 50 N.E. 30 (1898); *Thomas v. Simmons*, 2 N.E. 203 (1885); *Willson v. Binford Adm'r*, 54 Ind. 569 (1876).

210. *National City Bank*, 717 N.E.2d at 938.

211. *Id.*



all available means, including garnishment. In some states, no such election of remedies exists and the mortgagee must proceed against the real estate first.<sup>212</sup> Only if a deficiency remains and the state does not have an anti-deficiency judgment statute,<sup>213</sup> may the creditor pursue other collection procedures. Despite the prohibition of garnishment proceedings until after the amount of a deficiency is established by a foreclosure sale, creditors in foreclosure proceedings in Indiana still occupy a comparatively favorable position as they enjoy powers and options not available in some other states.

*C. The Equity of Redemption and the Recording System: Finucane v. Union Planters Bank, N.A.*<sup>214</sup>

*Finucane* not only confirms priority rules to resolve competing claims of ownership of land but it also impliedly demonstrates the principles underlying the equity of redemption and even addresses the integrity of the recording process. In this case, Union Planters Bank filed a complaint to foreclose on a mortgage on real estate owned by Secrest and others. The trial court entered a personal money judgment against Secrest in favor of the bank and issued a decree foreclosing the bank's mortgage and directing the sheriff to sell the property to satisfy the judgment. The sheriff's sale was scheduled for March 25, 1999.

Three days before the scheduled sale, Secrest sold the property to Hamilton Proper North for \$150,000. The bank received sufficient proceeds from the sale, \$83,877.49, to pay the judgment against Secrest in full. However, neither counsel for the bank nor the sheriff received notice of the private sale until after March 25, and the foreclosure sale took place as scheduled. Finucane was the successful bidder at the foreclosure sale and purchased the property for \$91,000. Finucane received a sheriff's deed on March 26, and he recorded that deed on March 30. Even though Secrest had given a warranty deed to Hamilton Proper on March 22, that deed was not recorded until March 31, which meant it was not discoverable in the public records when Finucane recorded his deed. The bank filed a motion to vacate the sheriff's sale and to set aside the sheriff's deed on the ground that Secrest had paid the loan balance in full on March 22, which rendered the foreclosure action moot. Finucane filed a motion to intervene and argued that his sheriff's deed was superior to the deed to Hamilton Proper because Finucane was a bona fide purchaser who recorded his deed first. The trial court granted the bank's motion, vacated the sheriff's sale, and ordered the county clerk to refund Finucane's money; Finucane appealed.<sup>215</sup>

The court of appeals concluded that the bona fide purchaser concept is an

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212. See, e.g., N.Y. Real Prop. Acts Law §§ 1301, 1401 (McKinney 1979).

213. See, e.g., N.C. Gen. Stat. § 45-21.38 (1976); Robert M. Washburn, *The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales*, 53 S. CAL. L. REV. 843 (1980).

214. 732 N.E.2d 175 (Ind. Ct. App. 2000).

215. See *id.* at 176.



equitable doctrine and that is within the discretion of the trial court to balance it against other equitable factors involved in the case.<sup>216</sup> Here, the trial court's discretion to set aside the sheriff's sale was supported both by absence of communication about the sale to Hamilton Proper and by the law relating to mortgage indebtedness.

An unseverable attribute of a mortgage is the mortgagor's equity of redemption. At any time up to the moment that the sheriff strikes off the sale of the foreclosed property to a buyer, the mortgagor has the absolute right to redeem the property from foreclosure by paying to the mortgagee the full amount of the unpaid principal, accrued interest, and allowable expenses. Secrest exercised this right by way of his sale to the property to Hamilton Proper.

Once this sale was completed and the mortgagee's interest in the property was satisfied, the foreclosure proceedings became moot. The appellate court noted that there can be no foreclosure proceeding without a mortgage and that, as a matter of law, there cannot be a mortgage without an underlying indebtedness. The court stated: "It is well settled that 'the mortgage is a mere security for the debt' [and that] there must be some obligation for the [mortgage] lien to secure. When that obligation is discharged the mortgage becomes *functus officio* and legally dead."<sup>217</sup> The result is that the legal justification for the sheriff's sale ceases to exist.<sup>218</sup>

Finucane argued that the bank's judgment had not been released on the judgment docket of the clerk and therefore had not been extinguished. As a result, the public document recording system indicated to Finucane that the property was still subject to foreclosure on the sale date. The appellate court rejected this argument by stating that it is the payment of the underlying indebtedness that effects the release of the judgment, not the recording of the release.<sup>219</sup> The recording merely gives notice of the release to third parties.

Under most circumstances, one who qualifies as a bona fide purchaser will be considered to have the superior interest in property, and here Finucane purchased the property for value and without notice of the private sale. Further, the maxim that "first in time is first in right" is a fundamental concept of real estate law, and Finucane recorded his sheriff's deed ahead of Hamilton Proper's deed. Nonetheless, it should always be remembered that foreclosure proceedings are actions in equity and not at law, and courts always retain their equitable powers to reach a "just" result, even if doing so affects other generally accepted principles and displays a gap in the reliability of the recording procedures for persons dealing with a parcel of real estate.

## VI. THE IMPACT OF THE STATUTE OF FRAUDS ON TRANSFERS OF REAL ESTATE

Two opinions issued by the court of appeals in the survey period considered

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216. See *id.* at 177.

217. *Id.* at 177 (quoting *Egbert v. Egbert*, 132 N.E.2d 910, 918 (Ind. 1956)).

218. See *id.*

219. See *id.* at 177-78.



the application of the statute of frauds to real estate transfers. The statutes of frauds in American law can be traced to the passage of a statute enacted by the British Parliament in 1677.<sup>220</sup> This statute, and all of its progeny, recognize the danger of fraudulent testimony and the difficulties of proof inherent in allegations of a breach of an oral contract and seek to eliminate the opportunity for such fraud by requiring that contracts involving certain types of matters must be in writing to be enforceable. One type of contract that has been within the scope of the statute of frauds from the beginning is an agreement for the sale of real estate.

Indiana has multiple statutes of frauds, including a general statute<sup>221</sup> and several specialized statutes, at least two of which are relevant to transfers of interests in real estate.<sup>222</sup> Indiana's general statute of frauds provides:

[N]o action shall be brought . . . upon any contract for the sale of lands . . . [u]nless the promise, contract or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized. . . .<sup>223</sup>

This statute was interpreted in two Indiana appellate court decisions published during this survey period. The first opinion considered the scope of the statute of frauds, that is, the types of real estate transactions that are covered by its provisions. The court of appeals' decision is likely to surprise, and possibly dismay, many readers because it adopts an extremely restrictive interpretation of the scope of the statute that excludes many types of transactions previously considered to be well within the statute's reach. Even though this opinion was vacated by a grant of petition for transfer, it still merits discussion both on the legal principles involved and on the methodology (or lack of it) used by the court to reach its decision. The second case considered the availability of the part-performance doctrine as an alternative to a writing as a means of satisfying the statute of frauds, thereby rendering an oral promise to convey an interest in real estate enforceable.

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220. 29 Car. 2 (1677). The short title of the British Statute of Frauds is "An Act for prevention of Frauds and Perjuries."

221. See IND. CODE § 32-2-1-1 (1998).

222. The specialized statutes of frauds that are relevant to real estate transfers are Indiana Code section 32-2-2-1 (promises to pay a real estate commission must be in writing to be valid) and section 32-2-1.5-1 to -1.5-5 (promises to extend credit, which could include credit to pay for construction of, or improvements, on real estate must be in writing to be valid). Other specialized statutes of frauds include the requirement under article 2 of the Uniform Commercial Code that contracts for the sale of goods, or for modifications of contracts for the sale of goods, in excess of \$500 must be in writing to be valid. See IND. CODE § 26-1-2-201 (2000).

223. *Id.* § 32-2-1-1.



*A. Scope of the Statute of Frauds for Real Estate "Sales":  
Brown v. Branch*<sup>224</sup>

*Brown* provides a model setting for the statute of frauds' concern with the difficulty of relying on allegations of oral promises in real estate matters. The case involves a romantic relationship that vacillates between affection and anger, between union and break-up, between living together in Indiana and living apart in different states. Emotions and motivations of the parties were bound to run high.

It is unfortunate that the court of appeals' analysis neglects to identify any of the competing policies involved in favor of applying either the statute of frauds or the exception to that rule provided by promissory estoppel principles. The inadequacy of the analysis raises serious concerns about the opinion, both as it directly affects the parties involved and as it would have affected other people in the future, had the opinion been permitted to stand, who would have been compelled to look at *Brown* as a source of common law. There is much for the Indiana Supreme Court to make right in this case.

Clifford Brown and Rhonda Branch were involved in a stormy romantic relationship over a ten-year period. Brown owned a house in which he and Branch lived for some unspecified time. During that period, the relationship reached a point where Branch moved out of Brown's house and moved to Missouri. At an unspecified time during Branch's residency in Missouri, she and Brown had a telephone conversation in which Brown stated that if Branch would move back to Indiana she would "always have the . . . house."<sup>225</sup> Branch first testified that she had decided to return to Indiana prior to Brown's statement about the house, but she later "clarified" her testimony to mean that Brown's promise about the house was "a major influence and factor in her decision to return to Indiana."<sup>226</sup>

Following Branch's return to Indiana, the relationship ended again, and when Brown refused to convey ownership of the house to Branch, she sued to compel that conveyance on the theory of promissory estoppel. Brown moved for summary judgment on the ground that any promise he had made to Branch was unenforceable under the statute of frauds. His motion was denied, and following trial, the court concluded that the elements of promissory estoppel had been met.<sup>227</sup> As a result, Brown was ordered to convey title of the house to Branch.<sup>228</sup>

On Brown's appeal, the court of appeals was faced with two issues: first, was Brown's promise that Branch "would always have . . . the house" within the scope of the statute of frauds, and second, did Branch establish the elements of

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224. 733 N.E.2d 17 (Ind. Ct. App.), *trans. granted*, 741 N.E.2d 1259 (Ind. 2000). As of the date this Article was sent to the printer, the Indiana Supreme Court had not acted further on this case.

225. *Id.*

226. *Id.*

227. *See id.* at 20.

228. *See id.*



promissory estoppel. With regard to the first issue, both the court of appeals' decision and its analytical process are disturbing.

Indiana's statute of frauds includes "any contract for the sale of lands."<sup>229</sup> In analyzing Brown's promise, the court of appeals recited several maxims of statutory interpretation but relied most heavily on the rule that even though "[t]he legislature's definition of a word binds us . . . 'when the legislature has not defined a word, we give the word its common and ordinary meaning.'"<sup>230</sup> The decision in this case, and an important principle of property law, depended on an analysis of the scope of the meaning of the word "sale" as used in the statute of frauds. Brown contended that "sale" is meant to mean "conveyance," while Branch contended that the term is restricted solely to an exchange of money for title. The court's *entire* analysis of the scope of transactions within the statute of frauds consists of one paragraph in which the sole authority cited is Black's Law Dictionary.<sup>231</sup>

The court quoted the dictionary as defining the word "sale" to mean "[a] contract between two parties, called, respectively, the 'seller' . . . and the 'buyer,' . . . by which the former, in consideration of the payment or promise of payment of a certain price in money, transfers to the latter the title and possession of property."<sup>232</sup> The court concluded that because Branch did not enter into a contract for Brown's house wherein she "agreed to pay for or purchase the property," Brown's "promise of the . . . house to [Branch] was not a 'sale.'"<sup>233</sup>

Further, the court stated that although Branch's promise to return to Indiana "may have been consideration for the promise of the house," that consideration "certainly was not the type of consideration contemplated when property is sold."<sup>234</sup> The court never explains why this conclusion is "certain," and its *sole* source of authority for the differentiation between sufficient and insufficient consideration was, once again, limited to one definition from Black's Law Dictionary. The definition chosen for the word "sale" by the court of appeals was restricted to include a "transfer of property for a fixed price in money or its equivalent . . . [and a] contract whereby property is transferred from one person to another for consideration of value."<sup>235</sup> Having created a major premise based on these definitions, the court of appeals concluded that "the Statute of Frauds does not apply to this case because there was not a sale of land."<sup>236</sup> Thus, "no

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229. IND. CODE § 32-2-1-1 (2000).

230. *Brown*, 733 N.E.2d at 22 (quoting *Citizens Action Coalition of Ind., Inc. v. Ind. Statewide Ass'n of Rural Elec. Corps.*, 693 N.E.2d 1324, 1327 (Ind. Ct. App. 1998)). The court also notes, in a footnote, that "the Statute of Frauds does not use the terms sale and conveyance interchangeably." *Id.* at 21 n.2. The significance of this statement is not explained.

231. *See id.* at 22.

232. *Id.* (quoting BLACK'S LAW DICTIONARY 1337 (6th ed. 1990)).

233. *Id.*

234. *Id.*

235. *Id.* (quoting BLACK'S LAW DICTIONARY 1337 (6th ed. 1990)).

236. *Id.*



writing was necessary and the Statute of Frauds is not an appropriate defense"<sup>237</sup> for *Brown*.

There are at least two significant problems with the court of appeals' analysis. First, the opinion completely ignores a rich history of Indiana Supreme Court and Indiana Court of Appeals opinions, both recent and long-standing, that have applied the statute of frauds to many situations other than a "contract between two parties, called, respectively, the 'seller' . . . and the 'buyer,' . . . by which the former, in consideration of the payment or promise of payment of a certain price in money, transfers to the latter the title and possession of property."<sup>238</sup> For example, Indiana appellate courts have found the statute of frauds to be applicable to: (1) an agreement to grant a mortgage on real estate;<sup>239</sup> (2) an alleged oral agreement for a grantor to continue in possession of real estate after title to that real estate had been conveyed to grantee by deed;<sup>240</sup> (3) an antenuptial agreement whereby two persons agree that upon the death of either of them, the survivor will not assert a claim against the decedents' real property;<sup>241</sup> (4) an oral option contract for the purchase real estate;<sup>242</sup> (5) a parol gift of land;<sup>243</sup> (6) an oral agreement to reconvey real estate;<sup>244</sup> and (7) an oral agreement to bequest and devise a share of real property to an illegitimate child in exchange for a promise by the child's mother to forebear filing a paternity suit.<sup>245</sup> None of these transfers, long considered to be within the scope of the statute of frauds, would meet the overly constrictive concept of "sale" used by the court of appeals in *Brown*.

Had the *Brown* court consulted these existing precedents it would have been precluded from adopting its constrained definition of the statutory term "sale."

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237. *Id.*

238. *Id.* (quoting BLACK'S LAW DICTIONARY 1337 (6th ed. 1990)).

239. See *Brown v. Stapleton*, 24 N.E.2d 909, 911 (Ind. 1940) ("[A]n oral promise to give a mortgage on real estate is within the statute of frauds and can not be enforced . . .").

240. See *Guckenberger v. Shank*, 37 N.E.2d 708, 713 (Ind. App. 1948) (en banc) ("It is the law that a right to the possession of real estate is an interest therein, and any contract which seeks to convey an interest in land is required to be in writing.") (emphasis added)).

241. See *Rainbolt v. East*, 56 Ind. 538, 539 (1877) ("[The] part of the contract [dealing with claims against real estate] is within that clause of the statute [of frauds], which prohibits an action upon a contract for the purchase of real estate . . . unless the contract is in writing.").

242. See *Hilker v. Curdes*, 133 N.E. 851, 853 (Ind. App. 1922) (an option to purchase land, if accepted, "would not afford a basis for a decree of specific performance, as it would be within the statute of frauds").

243. See *Osterhouse v. Creviston*, 111 N.E. 634, 636-37 (Ind. App. 1916) ("A parol gift . . . of land, may be taken out of the statute of frauds [only] by clear and definite proof of the . . . gift followed by full possession, use, and control of the land.").

244. See *Lux v. Schroeder*, 645 N.E.2d 1114, 1117 (Ind. Ct. App. 1995), *trans. denied* ("Lux cites no . . . authority for the proposition that an agreement to reconvey real estate is not a contract for the sale of land subject to the statute of frauds, nor does our research reveal any.").

245. See *Hurd v. Ball*, 143 N.E.2d 458, 463 (Ind. App. 1957) ("[S]uch a contract has been held to be within the inhibition of the Statute of Frauds.").



The definition chosen by the court will certainly permit more actions to proceed on the basis of oral allegations alone than was previously thought possible, and the evidentiary and fraud prevention functions of the statute of frauds will be frustrated.

The court of appeals' view of the statute also enabled it to sidestep any analysis of whether the statute of frauds could be satisfied by way of a non-writing substitute. Indiana law recognizes that a promise that would otherwise be subject to the statute of frauds can be removed from its operation through promissory estoppel.<sup>246</sup> Courts that have used promissory estoppel to take an oral promise out of the statute of frauds recognize that "[a] statute that was designed to prevent fraud cannot be used as an instrument of fraud."<sup>247</sup> A claim of estoppel cannot remove a case from the operation of the statute of frauds, however, "where the promise relied upon is the very promise that the Statute declares unenforceable if not in writing."<sup>248</sup> In addition, if the promisor's refusal to carry out the oral promise must result not only in the denial of the benefit of the oral bargain but must also result in "the infliction of an unjust and unconscionable injury and loss,"<sup>249</sup> before a court can enforce the oral promise notwithstanding the statute of frauds.<sup>250</sup>

The court evades this issue entirely in *Brown* by stating that:

because we hold that [Brown's] oral promise of the . . . house to Rhonda does not constitute a contract for the sale of land and thus, the Statute of Frauds does not apply, we need not discuss whether the injury was such that the claim would otherwise be removed from the Statute of Frauds.<sup>251</sup>

By failing to analyze the "unjust and unconscionable injury and loss" element and the requirement that the plaintiff's actions are "referable" to the oral promise,<sup>252</sup> the *Brown* court missed the opportunity, and obligation, to examine the proper balance between the policies furthered by the statute of frauds and the policies furthered by the exception. The choices involved are not easy to make, but they deserve to be addressed.

The statute of frauds aims to guard against the temptation to commit fraud and against the weaknesses of fallible memories by requiring certain promises to be in writing before they can be enforced. With its emphasis on evidentiary reliability, the operation of the statute can in some instances result in the unenforceability of promises that were actually made. Any apparent harshness of the statute is ameliorated by the exceptions to the statute that a court can

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246. *Wabash Grain, Inc. v. Bank One, Crawfordsville, NA*, 713 N.E.2d 323 (Ind. Ct. App. 1999).

247. *See Whiteco Indus., Inc. v. Kopani*, 514 N.E.2d 840, 844 (Ind. Ct. App. 1987).

248. *Brown*, 733 N.E.2d at 21 (quoting *Ohio Valley Plastics, Inc. v. Nat'l City Bank*, 687 N.E.2d 260, 264 (Ind. Ct. App. 1997)).

249. *Id.* at 22 (quoting *Wabash Grain, Inc.*, 713 N.E.2d at 326).

250. *See id.*

251. *Id.*

252. *Perkins v. Owens*, 721 N.E.2d 289 (Ind. Ct. App. 1999).



utilize in appropriate cases. The promissory estoppel exception seeks to prevent a promisor from using the statute of frauds as a shield to insulate himself from responsibility for unwritten promises that would result in injustice if the promise is not enforced.

Perhaps the element of promissory estoppel that "injustice can be avoided only by enforcement of the promise"<sup>253</sup> examined by the *Brown* court leads to the same result as the statute of fraud exception requirement that the promisee's reliance produce "an unjust and unconscionable result."<sup>254</sup> Also, perhaps the "reasonable reliance"<sup>255</sup> element of promissory estoppel is analogous to the "referable to the oral promise"<sup>256</sup> requirement of the exception to the writing requirement. Then again, the two analyses may not be interchangeable, and the evidentiary functions served by the factors that must be shown for an exception to the writing requirement of the statute of frauds may not be adequately advanced by an alternative analysis.

That part of the *Brown* opinion that examines the parties' words and actions in the context of the elements of promissory estoppel also lacks any case law analysis, and this absence of case law reasoning is the second significant problem with the *Brown* opinion. The opinion contains no reference to precedent and fails to analogize or distinguish the facts of previous cases and the current one. The *Brown* court's substantive analysis of Branch's promissory estoppel claim consists of nearly three pages. In those three pages, the court analyzed whether Brown made a promise, whether Branch's reliance on Brown's promise was reasonable given his drinking problems and the "tumultuous" nature of their relationship, whether Branch's reliance was definite and substantial, and whether injustice would result if Branch was not awarded ownership of the house. For all of these issues, the court cites only one case, *Weinig v. Weinig*,<sup>257</sup> and only then to identify the elements of promissory estoppel.<sup>258</sup>

The facts of this case disclose that Branch had once before quit her schooling and job in Missouri and had moved back to Indiana to be with Brown without any promise pertaining to the house. Further, Branch testified that she had decided to move back to Indiana to be with Brown the last time before he made any statements about the house. Given those facts, the analysis of the elements of promissory estoppel merited more discussion than a repetition of the facts before the trial court and a conclusory statement that the appellate court would not reweigh that evidence. The appellate court should have established the case law standards by which the trial court's conclusion could be judged as proper or improper. Unfortunately, that was not done.

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253. *Brown*, 733 N.E.2d at 23.

254. *Id.* at 22 (citing *Wabash Grain, Inc.*, 713 N.E.2d at 326).

255. *Id.* at 23.

256. *Perkins*, 674 N.E.2d at 292.

257. 674 N.E.2d 991 (Ind. Ct. App. 1996).

258. *See Brown*, 733 N.E.2d at 23. The court referred to *Weinig* one additional time, but only in the context of quoting from Branch's appellate brief, in which she referred to *Weinig* in support of her reliance argument. *See id.* at 24.



Although the common law has the ability to change to meet changed conditions, case law reasoning is built upon predictability, which is inherent in the principle of *stare densis*. Given similar facts, a case to be decided today will have the same result as a case decided in the past. This stability informs the party to litigation that the decision resolving their disputed claims is fair, and therefore acceptable even to the loser. In the absence of any meaningful case law analysis, this function of the common law is not fulfilled by the *Brown* opinion.

Closely related to the fairness assurance arising from predictability is the idea that case law reasoning serves as a check on the idiosyncracies of judges. An individual judge is hindered by the press of precedent cases from substituting (or being perceived as substituting) her chosen result for a result shaped by the decisionmaking process employed by other judges. The comfort of objectivity is lost in the absence of application of precedent, as in *Brown*.

Finally, judge-made common law supplies a basis for people to choose to act, or to refrain from acting, in a particular way in the future. Decided cases enable people to predict whether conduct they are contemplating will be permissible or subject to court intervention. Separated as it is from any sequence of prior decisions, the *Brown* opinion engenders uncertainty, not certainty, in ordering future conduct.

The functions of common law are inseparable from the form of case law reasoning. Selection of appropriate precedent cases and thoughtful analysis of those precedents, resulting in either analogy to or distinction from the case under consideration, are not optional. Any other approach does not do justice to "the Grand Tradition of the Common Law [which] is our rightful heritage."<sup>259</sup>

#### *B. The Part-Performance Doctrine: Perkins v. Owens*<sup>260</sup>

*Perkins* contains an analysis of a contention that the part-performance exception to the statute of frauds should operate to make an oral promise to convey an interest in land enforceable. Two property owners, Owens and Leedy, purchased separate lots in 1978 from Stottlemeyer Lumber Company. These lots were contiguous to lots that Owens and Leedy already owned. Stottlemeyer retained ownership of a thirty-foot strip of land that it needed to provide access to its property. In 1992, Perkins purchased land from the same piece of property out of which Owens' and Leedy's lots had been subdivided. The deed from Stottlemeyer to Perkins included the thirty-foot strip.

Owens and Leedy filed a complaint to have that portion of the Stottlemeyer-Perkins deed that contained the thirty-foot strip declared void. Owens and Leedy contended that they had a prior oral agreement with Stottlemeyer that obligated it to transfer title of the strip to them once it had sold all of the remaining lots created from its property, and they sought an order of specific performance of that oral agreement. The trial court entered a general judgment in favor of

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259. LEWELLEN, *supra* note 1, at 189.

260. 721 N.E.2d 289 (Ind. Ct. App. 1999).



Owens and Leedy, and Perkins and Stottlemeyer appealed.<sup>261</sup> The court of appeals reversed the trial court's decision in a memorandum decision and remanded the case to the trial court with instructions to enter findings of fact and conclusions of law sufficiently specific to satisfy a request for special findings that had been filed at trial.<sup>262</sup> The trial court entered a subsequent order in favor of Owens and Leedy on the basis that the oral agreement between them and Stottlemeyer was taken out of the statute of frauds by the part-performance doctrine.<sup>263</sup> The court of appeals, which retained jurisdiction over the case, then reviewed the trial court's second order. The court of appeals reversed the trial court's decision and remanded with instructions to enter a judgment in favor of Perkins.<sup>264</sup>

In the latter *Perkins* opinion, the court of appeals recognized the rule that "[o]ral contracts may be excepted from the statute of frauds by the doctrine of part performance."<sup>265</sup> To qualify under the part-performance exception, the party seeking to enforce the oral agreement must show "some combination of the following: payment of the purchase price or a part thereof; possession; and lasting and valuable improvements on the land."<sup>266</sup> The parties did not contest the issue of payment for the thirty-foot strip because such payment was considered to have been included in the purchase price of the two original lots.

The court of appeals analyzed the possession and improvements requirements and found both to be lacking. Between the dates of Owens' and Leedy's purchase of land from Stottlemeyer in 1978, and Stottlemeyer's sale to Perkins in 1992, Owens and Leedy had used the thirty-foot strip by landscaping it, by placing a utility barn on it, by using it for a garden and as a place to store firewood. The court of appeals concluded that these uses did not sufficiently evidence the unequivocal possession required by the part performance doctrine, especially when such acts began prior to the alleged oral promise.<sup>267</sup> Additionally, the appellate court noted that the possession yielded from one party to the other must be "referable to the contract."<sup>268</sup> Again, because Owens and Leedy began their uses of Stottlemeyer's property prior to their purchase dates, their possession of it was not "referable to" the alleged oral promise. "Finally, the appellate court concluded that Owens' and Leedy's uses of the thirty-foot strip did not constitute "valuable and lasting" improvements."<sup>269</sup> With only the payment element satisfied which "standing alone, is insufficient to remove a case from the statute of frauds,"<sup>270</sup> the court of appeals concluded that Owens and Leedy had not established part-performance to take Stottlemeyer's oral promise

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261. *See id.* at 291.

262. *See id.*

263. *See id.*

264. *See id.* at 294.

265. *See id.* at 292.

266. *Id.*

267. *See id.*

268. *Id.* at 292-93.

269. *Id.* at 293.

270. *Id.* at 292.



out of the statute of frauds.

*Perkins* provides a ready contrast to *Brown* as the former contains a recognition of the valid policies supporting the statute of frauds that is wholly missing from the latter. In *Perkins*, the court recognized that the statute of frauds "is intended to preclude fraudulent claims which would probably arise when one person's word is pitted against another's and which would 'open wide those ubiquitous flood-gates of litigation.'"<sup>271</sup> In other words, the writing does not prove the contents of the parties' alleged agreement; it merely provides some assurance that an agreement may have been made. At the same time, the court also acknowledged in *Perkins* that circumstances exist which can substitute for a writing and still fulfill the evidentiary safeguards that underlie the statute of frauds. One of those writing substitutes is part performance. However, to be acceptable as a writing substitute a party's part performance must provide some assurance that an agreement was made. This assurance comes from satisfaction of the three required elements. In this manner, the "validity of the rationale behind the statute of frauds"<sup>272</sup> is preserved, even "rather strictly adhered to,"<sup>273</sup> while still permitting avoidance of "the infliction of an unjust and unconscionable injury and loss"<sup>274</sup> where a trier of fact may conclude that they exist. The identification and balancing of competing policy interests and the use of precedent distinguishes this case from *Brown*.

#### CONCLUSION

The law of property developed in Indiana in 2000 displays some of the wide diversity of issues that affect the ownership, transfer, and financing of real property and improvements. The court of appeals issued opinions relating to several stages of property ownership, from retaining a broker to acquire real property to foreclosure procedures. The court's opinions also considered different estates in real property, from leasehold interests to fee simple ownership. In addition to subject matter, the development of the law of property in 2000 serves as a reminder that the reasoning process used to make a decision is as much a part of the common law as the rules themselves—so much so that the process has been said to have "come to represent the very meaning of our law."<sup>275</sup>

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271. *Id.* (quoting *Summerlot v. Summerlot*, 408 N.E.2d 820, 828 (Ind. Ct. App. 1980)).

272. *Id.*

273. *Id.*

274. *Brown v. Branch*, 733 N.E.2d 17, 22 (Ind. Ct. App. 2000).

275. ALFRED H. KNIGHT, *THE LIFE OF THE LAW* 41 (1996).







# DEVELOPMENTS IN INDIANA TAXATION

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## INTRODUCTION

The 111th Indiana General Assembly, the Governor of Indiana, the Indiana Supreme Court, and the Indiana Tax Court each contributed changes and clarifications to the Indiana tax laws in 2000.<sup>1</sup> This Article highlights the more interesting developments for the period of October 1, 1999 through September 30, 2000.<sup>2</sup>

## I. GENERAL ASSEMBLY LEGISLATION

Numerous legislative changes in 2000 impacted Indiana taxation. While many of the changes were made to fine-tune existing laws, some policy changes occurred in each of the following Indiana tax areas: property tax, income tax, tax credits, food and beverage tax, inheritance tax, financial institutions tax, and tax administration.

### *A. Indiana Property Taxes*

The General Assembly enacted several laws affecting Indiana property taxes. For example, the General Assembly amended the law concerning the deduction for rehabilitation or redevelopment of real property in economic revitalization areas (ERA) from the assessed value of property.<sup>3</sup> This new law extends the

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1. Hereinafter, at times, the following abbreviations are used in this Article: the Indiana General Assembly is referred to as General Assembly; the Governor of Indiana is referred to as Governor; the Indiana State Board of Tax Commissioners is referred to as ISBTC; the Indiana Department of State Revenue is referred to as IDSR; the Indiana Supreme Court is referred to as supreme court; the Indiana Tax Court is referred to as tax court; and, the terms petitioner, petitioners, taxpayer, and taxpayers are used interchangeably.

2. For comprehensive information concerning the Indiana Tax Court, the Indiana Department of State Revenue, the Indiana State Board of Tax Commissioners, and a variety of other tax items related to Indiana tax laws, visit the Indiana Web Site, *available at* <http://www.ai.org>.

3. See IND. CODE § 6-1.1-12.1-1(1) (2000). An economic revitalization area (ERA) is defined as:

[A]n area which is within the corporate limits of a city, town, or county which has become undesirable for, or impossible of, normal development and occupancy because of a lack of development, cessation of growth, deterioration of improvements or character of occupancy, age, obsolescence, substandard buildings, or other factors which have impaired values or prevent a normal development of property or use of property.



tangible property tax deduction to eligible "[n]ew research and development equipment," which refers to "tangible personal property that: (A) is installed after June 30, 2000, and before January 1, 2006, in an [ERA] in which a deduction for tangible personal property is allowed."<sup>4</sup> The tangible personal property consists of laboratory equipment, research and development equipment, computers and computer software, telecommunications equipment, or testing equipment that "is used in research and development activities devoted directly and exclusively to experimental or laboratory research and development for new products, new uses of existing products, or improving or testing existing products" and that "is acquired by the property owner" for the above stated purposes and which research and development equipment "was never before used by the owner for any purpose in Indiana."<sup>5</sup> New research and development equipment excludes "equipment installed in facilities used for or in connection with efficiency surveys, management studies, consumer surveys, economic surveys, advertising or promotion, or research in connection with literacy, history, or similar projects."<sup>6</sup>

In the same bill, the General Assembly revised the statute concerning the deduction for rehabilitation or redevelopment of real property in ERAs from the assessed value of property with respect to the periods for which the property tax deduction may be granted by the designating body.<sup>7</sup> For real property located in an area designated as an ERA, other than a residentially distressed area, the real property deduction may be allowed for a period from one to ten years.<sup>8</sup> In the case of real property located in an ERA which is a residentially distressed area, the period is from one to five years.<sup>9</sup> In the case of tangible personal property which is located in an ERA, the deduction for the tangible personal property may be allowed for a period from one to ten years.<sup>10</sup> These provisions were effective on July 1, 2000.<sup>11</sup>

The General Assembly also made three important amendments to the property tax statute. First, the General Assembly amended the statute concerning the real property deduction for rehabilitation or redevelopment of real property in ERAs from the assessed value of property.<sup>12</sup> The amended statute provides

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[An ERA] also includes: (A) any area where a facility or a group of facilities that are technologically, economically, or energy obsolete are located and where the obsolescence may lead to a decline in employment and tax revenues; and (B) a residentially distressed area . . . .

*Id.*

4. *Id.* § 6-1.1-12.1-1(12)(A).
5. *Id.* § 6-1.1-12.1-1(12)(B-D)
6. *Id.*
7. *See id.* § 6-1.1-12.1-3.
8. *See id.* § 6-1.1-12.1-3(d).
9. *See id.* § 6-1.1-12.1-3(c).
10. *See id.* § 6-1.1-12.1-4.5(h).
11. *See id.* § 6-1.1-12.1-3.
12. *See id.* § 6-1.1-12.1.



that a designating body may approve a deduction before September 1, 2000 "for the redevelopment or rehabilitation of real property consisting of residential facilities that are located in unincorporated areas of the county if the designating body makes a finding that the facilities are needed to serve . . . [e]lderly persons who are predominately low-income or moderate-income persons [and/or d]isabled persons."<sup>13</sup> The amended statute, which applies only to St. Joseph County, Indiana,<sup>14</sup> provides that a designating body may adopt an ordinance approving this deduction only one time and the provision expires on January 1, 2011.<sup>15</sup>

In addition, the General Assembly enacted statutory provisions concerning the real property deduction for rehabilitation or redevelopment of real property in ERAs from the assessed value of property.<sup>16</sup> The new provisions provide that a designating body may authorize an owner of real property and of manufacturing equipment to relocate such equipment to another piece of real property which is owned by such person and still retain the real property rehabilitation or redevelopment deduction with respect to the original real property, which deduction is granted under section 6-1.1-12 of the Indiana Code.<sup>17</sup> The relocation may be limited to a new location within the same ERA or to a new location within a different ERA, if the ERA is within the jurisdiction of the designating body.<sup>18</sup> Under the new law, the designating body must conduct a public hearing on the matter before authorization can be granted.<sup>19</sup> In addition, the designating body must notify each taxing unit within the original ERA and the new ERA of the proposed resolution.<sup>20</sup> If authorization is granted, the designating body must deliver a written copy of the authorization to both the county auditor and the ISBTC within thirty days after the issuance of the authorization.<sup>21</sup> New manufacturing equipment relocated under this new law remains eligible for the assessed value deduction.<sup>22</sup> However, the same deduction percentage is used as if the new manufacturing equipment was not relocated.<sup>23</sup>

The General Assembly also amended the statutory provisions concerning the exemption from the real property tax for buildings and land used for educational, literary, scientific, religious or charitable purposes.<sup>24</sup> Under the amended statute, the acreage of property that may be exempted from the real property tax is increased from fifty acres to two hundred acres for local associations formed for

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13. *Id.* § 6-1.1-12.1-3(f).

14. *See id.*

15. *See id.*

16. *See id.* § 6-1.1-12.1.

17. *See id.* § 6-1.1-12.1-4.6(a).

18. *See id.*

19. *See id.* § 6-1.1-12.1-4.6(b).

20. *See id.*

21. *See id.* § 6-1.1-12.1-4.6(c).

22. *See id.*; *see also id.* § 6-1.1-12.1.

23. *See id.* § 6-1.1-12.1-4.6(c).

24. *See id.* § 6-1.1-10-16.



the purpose of promoting 4-H programs.<sup>25</sup> This amendment was effective January 1, 2000.<sup>26</sup>

In another bill, the General Assembly established a real property tax exemption for certain real property that is or may be located in Marion County, Indiana,<sup>27</sup> that has been "constructed, rehabilitated, or acquired for the purpose of providing housing to income eligible persons under the federal low income housing tax credit program."<sup>28</sup> The new law permits the City-County Council in Marion County to enter into agreements to accept payments in lieu of real property taxes.<sup>29</sup> Such payments in lieu of taxes (PILOTS) must be in amounts equal to the amount of the real property tax that would have been levied by the City-County Council if the real property were not subject to an exemption from the real property tax.<sup>30</sup> The PILOTS collected must be deposited into the housing trust fund<sup>31</sup> and must be used for housing trust fund purposes.<sup>32</sup> Specifically, the housing trust fund must be used to enable individuals and families whose incomes equal or are below eighty percent of Marion County's median income for individuals and families to purchase or lease residential units within Marion County; to pay the expenses of administering the fund; "to mak[e] grants, loans, and loan guarantees for the development, rehabilitation, or financing of affordable housing for [such] individuals and families . . . including the elderly, persons with disabilities, and homeless individuals and families;" and to "provid[e] technical assistance to nonprofit developers of affordable housing" for such individuals and families.<sup>33</sup>

The General Assembly also amended the statutory provisions concerning the property tax exemptions for public airports.<sup>34</sup> Under the amendment, an exemption from the personal property tax is provided for commercial passenger aircraft located in specified counties solely for the purpose of maintenance.<sup>35</sup> Presently, this amendment affects Allen County, Indiana, and St. Joseph County, Indiana, and the amendment was effective on January 1, 2001.<sup>36</sup>

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25. *See id.* §§ 6-1.1-10-16(c)(2)(B), 6-1.1-10-16(d)(2)(B).

26. *See id.* § 6-1.1-10-16.

27. *See id.* § 6-1.1-10-16.7.

28. *Id.* § 6-1.1-10-16.7(3); *see also* 26 U.S.C. § 42 (2000) (providing a low-income housing credit).

29. *See* IND. CODE § 6-1.1-10-16.7 (2000).

30. *See id.* § 36-3-2-11(e).

31. *See id.* § 36-7-15.1-35.5.

32. *See id.* § 36-3-2-11(g).

33. *Id.* § 36-7-15.1-35.5(g).

34. *See id.* § 6-1.1-10-15.

35. *See id.* § 6-1.1-10-15(a) (referring to counties having a population of more than 200,000 but less than 400,000 individuals).

36. *See id.* § 6-1.1-10-15.



### *B. Indiana Income Taxes*

The General Assembly amended references to the Internal Revenue Code in certain Indiana income tax statutes. This amendment provides that the term "Internal Revenue Code" means the Internal Revenue Code of 1986 of the United States of America which was in effect on January 1, 1999.<sup>37</sup> This amendment applied retroactively as of January 1, 1999<sup>38</sup> and similar amendments have been made each year since the enactment of the Indiana Adjusted Gross Income Tax.

### *C. Indiana Tax Credits*

The General Assembly enacted three laws concerning Indiana tax credits. First, the General Assembly amended the statute dealing with the enterprise zone loan interest credit.<sup>39</sup> The current law provides that a taxpayer is entitled to the enterprise loan interest credit against certain tax liabilities<sup>40</sup> that the taxpayer owes to the State of Indiana if the taxpayer receives interest on a qualified loan.<sup>41</sup> Specifically, the amended law provides that a taxpayer claiming the credit is required to: pay the registration fee which is charged to zone businesses,<sup>42</sup> "provide[] the assistance to urban enterprise associations required from zone businesses,"<sup>43</sup> and comply with any requirements adopted by the enterprise zone board for taxpayers claiming the enterprise zone loan interest credit.<sup>44</sup> However, the amended law provides that if a taxpayer is located outside an enterprise zone, then the taxpayer is not required to reinvest these incentives within the enterprise zone, except with respect to the payment of the registration fee and the providing of assistance to urban enterprise associations.<sup>45</sup> These requirements apply retroactively as of January 1, 2000.<sup>46</sup>

The General Assembly also extended the expiration date of the research

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37. See *id.* § 6-3-1-11(a).

38. See *id.* § 6-3-1-11.

39. See *id.* § 6-3.1-7.

40. See *id.* § 6-3.1-7-1. The statute allows the taxpayer to take such a credit only against the following Indiana taxes: the gross income tax, the adjusted gross income tax, the supplemental net income tax, the bank tax, the savings and loan association tax, the insurance premiums tax, and the financial institutions tax. See *id.*

41. See *id.* § 6-3.1-7-2; see also *id.* § 6-3.1-7-1 (defining a qualified loan as "a loan which is made to an entity that uses the loan proceeds for: (1) a purpose that is directly related to a business located in an enterprise zone; (2) an improvement that increases the assessed value of real property located in an enterprise zone; or (3) rehabilitation, repair, or improvement of a residence").

42. See *id.* § 6-3.1-7-2(a)(2). The amended statute defines the term "zone business" to include any entity that claims certain tax benefits available to businesses located in an enterprise zone. See *id.* § 4-4-6.1-1.1.

43. *Id.* § 6-3.1-7-2(a)(3).

44. See *id.* §§ 4-4-6.1, 6-3.1-7-2(a)(4).

45. See *id.* § 6-3.1-7-2.

46. See *id.* §§ 4-4-6.1-1.1, 6-3.1-7-2.



expense credit.<sup>47</sup> Under the new provisions, a taxpayer who incurs an Indiana qualified research expense<sup>48</sup> in a particular taxable year is entitled to a research expense credit against the Indiana gross income tax, the Indiana adjusted gross income tax, and the Indiana supplemental net income tax for the taxable year.<sup>49</sup> Prior to the amendment, the credit was scheduled to expire on December 31, 1999,<sup>50</sup> but the amended statute provides that the credit is to expire for expenses incurred after December 31, 2002.<sup>51</sup>

The third provision amended the statute concerning the economic development for a growing economy (EDGE) tax credit.<sup>52</sup> Generally, a taxpayer is entitled to a credit against certain Indiana tax liabilities<sup>53</sup> that arose after December 31, 1993, and that the taxpayer owes to Indiana, if the taxpayer is awarded an EDGE tax credit by the EDGE board for that taxable year.<sup>54</sup> The amended statute permits the EDGE board to award an EDGE tax credit for a specific project located in Hamilton County, Indiana, to a nonprofit organization that is a high growth company with high skilled jobs<sup>55</sup> and that pays wages of at least seventy-five percent of the organization's total workforce in Indiana and which wages are equal to at least two hundred percent of the average county wage, as determined by the Indiana Department of Commerce, in the county where the project for which the credit is granted will be located. Further, the organization must make an investment of at least fifty million dollars in capital assets and the affected political subdivision must provide substantial financial assistance to the project. Also, the incremental payroll attributable to the project must be at least ten million dollars annually and the organization must agree to pay the ad valorem property taxes on the organization's real property and personal property that would otherwise be exempt under section 6-1.1-10 of the Indiana Code. In addition, the organization must not receive any deductions from the assessed value of the organization's real property and personal property under sections 6-1.1-12 or 6-1.1-12.1 of the Indiana Code and the organization must pay all of its ad valorem property taxes to the taxing units in the taxing district in which the project is located.<sup>56</sup> The Legislative Services Agency estimates that

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47. *See id.* § 6-3.1-4.

48. *See id.* § 6-3.1-4-1 (defining "Indiana qualified research expense" as an expense incurred for research conducted in Indiana; and "qualified research expense" as an expense as defined in 26 U.S.C. § 41(b) (2000)).

49. *See id.* § 6-3.1-4-2(a).

50. *See id.* § 6-3.1-4-6.

51. *See id.*

52. *See id.* § 6-3.1-13.

53. *See id.* § 6-3.1-13-9. The statute allows the taxpayer to take such tax credit only against the following Indiana taxes: the gross income tax; the adjusted gross income tax; the supplemental net income tax; the bank tax; the savings and loan association tax; the insurance premiums tax; and, the financial institutions tax. *See id.*

54. *See id.* § 6-3.1-13-11.

55. *See id.* §§ 4-4-10.9-9.5, 6-3.1-13-27.

56. *See id.* § 6-3.1-13-27(a)(2)(G).



the organization could receive up to \$310,000 in credits each taxable year for no more than ten years based on a \$10 million payroll multiplied by a 3.1% effective state income tax rate.<sup>57</sup>

#### *D. Indiana Food and Beverage Taxes*

The General Assembly amended and enacted laws dealing with both the Allen County Food and Beverage Tax<sup>58</sup> and the Allen County Supplemental Food and Beverage Tax.<sup>59</sup> The new provisions enable the Allen County fiscal body to impose a supplemental food and beverage tax at a rate not to exceed one percent.<sup>60</sup> However, the amended law provides that the Allen County Food and Beverage Tax must terminate upon the imposition of the Allen County Supplemental Food and Beverage Tax.<sup>61</sup> According to the Legislative Services Agency, the Allen County Food Beverage Tax generated almost \$3.9 million in revenue in fiscal year 1999.<sup>62</sup> The new tax applies "to any transaction in which food or beverage is furnished, prepared, or served: (1) for consumption at a location, or on equipment, provided by a retail merchant; (2) in [Allen County]; and (3) by a retail merchant for consideration."<sup>63</sup> Affected transactions

include transactions in which food or beverage is: (1) served by a retail merchant off the merchant's premises; (2) sold by a retail merchant who ordinarily bags, wraps, or packages the food or beverage for immediate consumption on or near the retail merchant's premises, including food or beverage sold on a "take out" or "to go" basis; or (3) sold by a street vendor.<sup>64</sup>

However, the new "tax does not apply to the furnishing, preparing, or serving of any food or beverage in a transaction that is exempt, or to the extent exempt, from the state gross retail [sales] tax imposed by [section 6-2.5 of the Indiana Code]."<sup>65</sup>

The provisions of the new law specify that the revenue from the new tax "may be appropriated only: (1) for acquisition, improvement, remodeling, or expansion of" an athletic and exhibition coliseum in existence before the

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57. See LEGISLATIVE SERVICES AGENCY, FISCAL IMPACT STATEMENT, available at [http://www.state.in.us/serv/lisa\\_billinfo?year=2000&request=getBill&doctype=HB&docno=1354](http://www.state.in.us/serv/lisa_billinfo?year=2000&request=getBill&doctype=HB&docno=1354) (last visited Mar. 4, 2001).

58. See IND. CODE § 6-9-23 (2000).

59. See *id.* § 6-9-33.

60. See *id.* § 6-9-33-5.

61. See *id.* § 6-9-23-3(d).

62. See LEGISLATIVE SERVICES AGENCY, FISCAL IMPACT STATEMENT, available at [http://www.state.in.us/serv/lisa\\_billinfo?year=2000&request=getBill&doctype=SB&docno=0216](http://www.state.in.us/serv/lisa_billinfo?year=2000&request=getBill&doctype=SB&docno=0216) (last visited Mar. 4, 2001).

63. IND. CODE § 6-9-33-4(a) (2000). See also *id.* § 6-2.5-4-1 (defining retail merchant).

64. *Id.* § 6-9-33-4(b).

65. *Id.* § 6-9-33-4(c).



adoption of the tax or "(2) to retire or advance refund bonds issued, loans obtained, or lease payments incurred . . . to remodel, expand, improve, or acquire; an athletic and exhibition coliseum in existence before the" adoption of the tax.<sup>66</sup> If the Allen County fiscal body imposes the Allen County Supplemental Food and Beverage Tax, then the Allen County Treasurer must establish "a supplemental coliseum improvement fund" and "deposit in this fund all amounts received from the [new] tax."<sup>67</sup> The Allen County Supplemental Food and Beverage Tax terminates two years after the retirement of debt that was incurred for such purposes.<sup>68</sup>

### *E. Indiana Inheritance Taxes*

The General Assembly revised the Indiana inheritance tax law<sup>69</sup> to authorize a refund of Indiana inheritance tax that has been erroneously or illegally collected<sup>70</sup> and to provide a procedure for making such refund.<sup>71</sup> The new law requires the IDSR to review each claim for refund and to enter an order either approving, partially approving, or disapproving the refund. If the IDSR either approves or partially approves a claim for refund, then the IDSR must send a copy of the order to the county treasurer who collected the inheritance tax, if the refund applies to inheritance tax collected as a result of a resident decedent's death; and, the Indiana treasurer. The Indiana treasurer is then required to pay the refund from money under the treasurer's control that has not otherwise been appropriated. Moreover, the Indiana treasurer is to receive a credit for the county portion of the amount so refunded and the appropriate county treasurer must "account for the credit on the county [treasurer's] inheritance tax report for the quarter in which the refund is paid."<sup>72</sup> Finally, "within five days after entering an order with respect to a claim for refund . . . , the [IDSR] must send a copy of the order to the person who filed the [refund] claim."<sup>73</sup>

### *F. Indiana Financial Institutions Tax*

The General Assembly amended the law dealing with taxation of Indiana domiciled financial institutions.<sup>74</sup> The former law imposed the financial institutions tax on the adjusted gross income of resident financial institutions and allowed a credit to be taken for taxes paid to other states.<sup>75</sup> On the other hand, nonresident financial institutions used a one factor apportionment formula of

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66. *Id.* § 6-9-33-8.

67. *Id.*

68. *See id.* § 6-9-33-3(d).

69. *See id.* § 6-4.1.

70. *See id.* § 6-4.1-10.

71. *See id.* § 6-4.1-10-3.

72. *Id.* § 6-4.1-10-3(a).

73. *Id.* § 6-4.1-10-3(b).

74. *See id.* § 6-5.5.

75. *See id.* §§ 6-5.5-2-2 (repealed 1999), 6-5.5-2-5 (repealed 1999).



receipts attributable to business transacted in Indiana under the former law.<sup>76</sup> The new law applies apportionment rules to all financial institutions by using Indiana receipts compared to total receipts, sourced by customer location.<sup>77</sup> The amended statute ensures that resident financial institutions are treated the same as nonresident financial institutions for purposes of the imposition of the financial institutions tax.<sup>78</sup> The Legislative Services Agency estimates that apportioning resident income will result in a net revenue loss of less than \$5 million annually from collections which totaled \$81.9 million in the fiscal year beginning October 1, 1999.<sup>79</sup> This amendment applies retroactively as of January 1, 1999.<sup>80</sup>

### *G. Tax Administration*

The General Assembly amended the law concerning the sale of real property when taxes or special assessments become delinquent.<sup>81</sup> Under the amended law, persons, and agents of such persons, who are delinquent with respect to Indiana real property tax payments are prohibited from purchasing real property at a tax sale.<sup>82</sup> The prohibition applies not only to persons who are delinquent in the payment of real property tax payments, but also to persons who are delinquent in the payment of special assessments, penalties, interest, or costs attributable to a prior real property tax sale.<sup>83</sup> If a person purchases real property that the person was not eligible to purchase, then the sale of the property is void.<sup>84</sup> Further, the appropriate county treasurer must apply the amount of the delinquent person's bid to the person's delinquent taxes and attempt to resell the real property.<sup>85</sup> This law was effective on July 1, 2000.<sup>86</sup>

## II. INDIANA SUPREME COURT OPINIONS AND DECISIONS

### *A. Subject Matter Jurisdiction of the Indiana Tax Court*

In *State Board of Tax Commissioners v. Troy Montgomery*,<sup>87</sup> the Indiana Supreme Court granted the ISBTC's Petition for Review to address whether the

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76. See *id.* § 6-5.5-2-3.

77. See *id.* § 6-5.5-4.

78. See *id.* §§ 6-5.5-2-1, 6-5.5-2-3, 6-5.5-2-4, 6-5.5-4-1.

79. See LEGISLATIVE SERVICES AGENCY, FISCAL IMPACT STATEMENT, available at [http://www.state.in.us/serv/lisa\\_billinfo?year=2000&request=getBill&doctype=HB&docno=1003](http://www.state.in.us/serv/lisa_billinfo?year=2000&request=getBill&doctype=HB&docno=1003) (last visited Mar. 3, 2001).

80. See IND. CODE §§ 6-5.5-2, 6-5.5-4 (2000).

81. See *id.* § 6-1.1-24.

82. See *id.* § 6-1.1-24-5.3(a).

83. See *id.*

84. See *id.* § 6-1.1-24-5.3(c).

85. See *id.*

86. See *id.* § 6-1.1-24-5.3.

87. 730 N.E.2d 680 (Ind. 2000).



tax court had subject matter jurisdiction under the circumstances presented in this case.<sup>88</sup> The supreme court concluded that Troy Montgomery must exhaust all administrative remedies in order for the tax court to have subject matter jurisdiction.<sup>89</sup>

The petitioners-below were Lake County, Indiana, on its own behalf and on behalf of property owners in Lake County, the Lake County Council, the Board of Commissioners of Lake County, and several individual members of the Council or the Board who sought to sue both in their official capacities and as taxpayers owning property in Lake County.<sup>90</sup> The petitioners-below brought suit in the tax court against the ISBTC, seeking a declaratory judgment that the Health Care for the Indigent program (HCI) violated article 10, section 1 and article 1, section 23 of the Indiana Constitution.<sup>91</sup> Specifically, the petitioners sought a declaratory judgment from the tax court stating that the formula for calculating the HCI tax levy was unconstitutional.<sup>92</sup>

The tax court had determined that a letter from the ISBTC did not constitute a final determination conferring subject matter jurisdiction, but nevertheless concluded that the tax court had jurisdiction because administrative remedies for challenging the HCI levy were inadequate, and therefore the parties were excused from pursuing them.<sup>93</sup> The tax court had also ruled that the governmental entities, with the exception of Lake County itself, lacked standing to contest the constitutionality of the HCI levy.<sup>94</sup> The tax court determined that Lake County was a proper party to the declaratory judgment action because if the petitioners succeeded, then the county would be forced to fund and administer the refund process.<sup>95</sup>

The ISBTC then "sought rehearing, arguing that because Lake County could seek reimbursement from the State [of Indiana] for any refunds it would be forced to pay, the taxpayers' remedies were adequate and exhaustion should not be excused."<sup>96</sup> In a second opinion,<sup>97</sup> the tax court again concluded that it had subject matter jurisdiction and that administrative remedies available to the petitioners-below were inadequate and that exhaustion was therefore excused.<sup>98</sup>

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88. See *id.* at 681.

89. See *id.* at 684-85.

90. See *id.* at 680-81.

91. See *id.* at 681.

92. See *id.* at 682.

93. See *id.* at 683 (citing *Lake County Council v. State Bd. of Tax Comm'rs*, 706 N.E.2d 270, 275-77 (Ind. Tax Ct. 1999)).

94. See *id.* (citing *Lake County Council*, 706 N.E.2d at 279-81).

95. See *id.* (citing *Lake County Council*, 706 N.E.2d at 281).

96. *Id.*

97. See *id.* at 683 n.8 (stating that the tax court issued its original opinion on January 19, 1999, and granting reconsideration in light of the supreme court's intervening modification of *State Board of Tax Commissioners v. Mixmill Manufacturing Co.*, 702 N.E.2d 701 (Ind. 1998), as modified Feb. 5, 1999).

98. See *id.* (citing *Montgomery v. State Bd. of Tax Comm'rs*, 708 N.E.2d 936 (Ind. Tax Ct.



The tax court also concluded that reimbursement was too speculative.<sup>99</sup> The tax court subsequently certified its opinions for interlocutory review by the supreme court.<sup>100</sup>

In deciding this case, the supreme court first evaluated whether the taxpayers failed to exhaust their administrative remedies and whether the taxpayers should be excused from pursuing these remedies on grounds of futility.<sup>101</sup> The supreme court reviewed its holdings in analogous cases and observed that section 6-1.1-27-6(b) of the Indiana Code provides for repayment by Indiana of tax overpayments and applies generally to all taxes.<sup>102</sup> The supreme court reasoned that the statutory scheme provides a workable mechanism for the county to recover from Indiana any required taxpayer refunds and that such mechanism avoids the difficulties that the tax court identified in reliance on the refund procedure as a remedy for unlawfully collected HCI taxes.<sup>103</sup> The supreme court concluded that a claim for refund could be presented and, if refused, would permit the petitioners-below to proceed to the tax court with their contentions. And, because the tax court had jurisdiction only to the extent granted by statute, the supreme court need not address whether or not the petitioners-below had standing to pursue their claim.<sup>104</sup> Therefore, the supreme court reversed the judgment of the tax court and remanded the case with instructions to dismiss the claim of the petitioners-below for declaratory relief against the ISBTC.<sup>105</sup>

### *B. Indiana Financial Institutions Tax*

In *Department of State Revenue v. Farm Credit Services of Mid-America, ACA*,<sup>106</sup> Farm Credit Services (taxpayer), an agricultural credit association,<sup>107</sup> claimed that it was "exempt from Indiana's Financial Institutions Tax under constitutional principles of intergovernmental tax immunity,"<sup>108</sup> but the supreme court concluded that the taxpayer was only partially exempt from the tax.<sup>109</sup>

The supreme court found that the doctrine of intergovernmental tax immunity has its roots in *McCulloch v. Maryland*,<sup>110</sup> in which the U.S. Supreme Court held

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1999)).

99. See *id.* (citing *Montgomery*, 708 N.E.2d at 938).

100. See *id.*

101. See *id.* at 683-84.

102. See *id.* at 685.

103. See *id.*

104. See *id.* at 685-86.

105. See *id.* at 686.

106. 734 N.E.2d 551 (Ind. 2000).

107. The taxpayer is part of the Farm Credit System, which is "a nation-wide network of cooperative, borrower-owned banks and lending institutions that were established to provide affordable credit to farmers and ranchers." *Id.* at 552 (citing 12 U.S.C. § 2001 (1989)).

108. *Id.* at 551.

109. See *id.*

110. 17 U.S. (4 Wheat.) 316 (1819).



that the State of Maryland could not impose a tax on the Bank of the United States,<sup>111</sup> and in *Graves v. New York ex rel. O'Keefe*,<sup>112</sup> wherein the U.S. Supreme Court held that "intergovernmental tax immunity bars only those taxes imposed directly on one sovereign by another, or that discriminate against the sovereign to which [the taxes] apply."<sup>113</sup> The Indiana Supreme Court found that more recent federal decisions suggest "that in determining tax status, a court must examine the nature of the instrumentality, and the activity being taxed."<sup>114</sup> The supreme court found that while the designation "federal instrumentality" carried with it a strong possibility of tax immunity, the supreme court's inquiry must include an analysis of what the taxpayer "actually is."<sup>115</sup>

Next, the Indiana Supreme Court examined the nature of Agricultural Credit Associations (ACAs) and indicated that they were entities created by merging Federal Land Bank Associations (FLBAs) and Production Credit Associations (PCAs).<sup>116</sup> The supreme court found that "FLBAs are federally chartered instrumentalities of the United States, offering long-term loans to farmers and farm-related businesses for land and other capital purchases."<sup>117</sup> The supreme court also found that "[s]ince their inception, FLBAs have enjoyed immunity from state taxation"<sup>118</sup> and that "PCAs are also 'federally chartered instrumentalities of the United States'; they are privately-owned, corporate financial institutions organized by ten or more farmers to provide short-term and intermediate loans to farmers."<sup>119</sup>

The supreme court recognized that "[u]nlike FLBAs, PCAs possess limited express tax immunity."<sup>120</sup> The supreme court also found that while both PCAs and FLBAs are privately owned and controlled, they are "considered 'government-sponsored entities' and have a preferred place in the nation's money markets, although debt issuances are not guaranteed by the United States."<sup>121</sup>

The supreme court then examined the statutory authorization to merge FLBAs and PCAs and found that while this statute authorizes such mergers, neither the statute nor the legislative history establishes what the tax implications are for the resulting ACA.<sup>122</sup> The supreme court also found that the legislative

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111. See *id.* at 436-37).

112. 306 U.S. 466 (1939).

113. *Farm Credit Servs. of Mid-Am., ACA*, 734 N.E.2d at 553 (citing *Graves*, 306 U.S. at 481-87).

114. *Id.* at 556.

115. *Id.* at 557.

116. See *id.*

117. *Id.* (citing 12 U.S.C. § 2091 (1989); H.R. REP. NO. 100-295(I), at 55 (1987), reprinted in 1987 U.S.C.C.A.N. 2723, 2727).

118. *Id.* (citing 12 U.S.C. § 2098 (1989)).

119. *Id.* (quoting 12 U.S.C. § 2071 (1989)).

120. *Id.*; see also 12 U.S.C. § 2077 (2000).

121. *Id.* at 558-59 (citing H.R. REP. NO. 100-295(I), at 55 (1987), reprinted in 1987 U.S.C.C.A.N. 2723, 2727).

122. See *id.* at 559 (citing 12 U.S.C. § 2279c-1 (2000)).



and regulatory history suggests that institutions created by mergers were deemed to retain the characteristics of the former entities.<sup>123</sup>

The supreme court concluded that "a merged association, like an ACA, is not considered a new organizational entity, but rather a combination of the two previous entities."<sup>124</sup> The supreme court then examined the taxpayer's structure and determined that it reflected this definition of merger.<sup>125</sup> The supreme court determined that the taxpayer essentially "performs two distinct and seemingly autonomous functions: long-term mortgage lending through an FLCA and short-term lending through a PCA."<sup>126</sup> The supreme court observed that the U.S. "Congress has been very clear in its decision that long-term lending institutions, such as FLBAs and FLCAs, should enjoy immunity from state taxation."<sup>127</sup> Therefore, the supreme court concluded that "the FLCA or long-term mortgage lending portion of [the taxpayer's] operations should not be factored into a calculation of taxes owed by [the taxpayer] under Indiana's Financial Institution Tax."<sup>128</sup> The supreme court then addressed the PCA or short-term lending portion of the taxpayer's operations and reached a different conclusion. The court reasoned that due to the "characteristics of the entity and [the U.S.] Congress's removal of the exemption, [it could] not conclude that a PCA is 'an agency or instrumentality so closely connected to the Government' so as to afford it an exemption from state taxation."<sup>129</sup>

The supreme court concluded that Indiana was entitled to tax that part of the taxpayer's "gross income derived from [its] short-term PCA operations, but not the income generated by long-term FLBA lending, which enjoys immunity from state taxation."<sup>130</sup> Accordingly, the supreme court reversed the decision of the tax court and remanded the case for "proceedings to determine the tax due on [the taxpayer's] PCA operations."<sup>131</sup>

### III. INDIANA TAX COURT OPINIONS AND DECISIONS

During the period of October 1, 1999 through September 30, 2000, the opinions and decisions of the Indiana Tax Court were dominated by cases dealing with Indiana real property taxes. Specifically, the tax court rendered twenty-nine published opinions, fourteen of which concerned various Indiana real property tax issues. The remaining fifteen cases are divided as follows: two cases regarding the Indiana tangible personal property tax;<sup>132</sup> two cases regarding the

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123. See *id.* (citing 12 U.S.C. § 2279c-1(b)(2) (2000)).

124. *Id.* at 560.

125. See *id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 561.

130. *Id.*

131. *Id.*

132. See IND. CODE §§ 6-1.1-2 to 6-1.1-2-7(b).



Indiana gross income tax;<sup>133</sup> two cases regarding the Indiana adjusted gross income tax;<sup>134</sup> one case regarding the Indiana sales and use taxes;<sup>135</sup> one case regarding the Indiana inheritance tax;<sup>136</sup> three cases regarding the Indiana controlled substances excise tax;<sup>137</sup> one case regarding the Indiana gaming card excise tax;<sup>138</sup> one case regarding the Indiana motor vehicle excise tax;<sup>139</sup> one case regarding a public lawsuit;<sup>140</sup> and one case regarding the payment of litigation expenses. Each case is set off separately below.

### A. Indiana Property Taxes—Real Property Taxes

1. *Town of St. John v. State Board of Tax Commissioners*.<sup>141</sup>—In *Town of St. John*, the petitioners' requested the tax court to order the ISBTC to adopt and implement new real property assessment regulations by dates certain.<sup>142</sup> The litigation in this case has continued for approximately seven years and has generated six published opinions, including two decisions by the Indiana Supreme Court.<sup>143</sup> In *St. John V*,<sup>144</sup> the immediately preceding litigation, the supreme court affirmed the tax court's determination in *St. John III*<sup>145</sup> that the cost schedules used in the ISBTC's real property assessment regulations violated the Property Taxation Clause of the Indiana Constitution.<sup>146</sup> The tax court subsequently entered an order requiring the ISBTC to implement a constitutional assessment system "as promptly as possible."<sup>147</sup> However, the court expressly reserved the right to set a specific date for the implementation of a remedy in its order.<sup>148</sup>

Because the tax court determined that the ISBTC had not complied with its earlier order, the court determined that it was necessary to establish a deadline for adopting and implementing new, constitutional assessment regulations.<sup>149</sup>

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133. See *id.* §§ 6-2.1-1-0.5 to 6-2.1-8-7.

134. See *id.* §§ 6-3-1-1 to 6-3-7-5.

135. See *id.* §§ 6-2.5-1-1 to 6-2.5-10-2.

136. See *id.* §§ 6-4.1-1-1 to 6-4.1-10-6.

137. See *id.* §§ 6-7-3-1 to 6-7-3-20.

138. See *id.* § 4-32-15-1.

139. See *id.* §§ 6-6-5-1 to 6-6-5-16.

140. See *id.* §§ 34-13-5-1 to 34-13-5-12.

141. 729 N.E.2d 242 (Ind. Tax Ct. 2000) ("*St. John VII*").

142. See *id.* at 244.

143. See *id.* An overview of this case's procedural history can be found in *State Board of Tax Commissioners v. Town of St. John*, 702 N.E.2d 1034, 1035-36 (Ind. 1998) ("*St. John V*").

144. *St. John V*, 702 N.E.2d at 1034.

145. *Town of St. John v. State Bd. of Tax Comm'rs*, 690 N.E.2d 370, 382 (Ind. Tax Ct. 1997) ("*St. John III*").

146. See *St. John VII*, 729 N.E.2d at 244; see also IND. CONST. art. X, § 1.

147. *St. John VII*, 729 N.E.2d at 244.

148. See *id.*

149. See *id.* at 245.



Accordingly, the tax court ordered the ISBTC to take several actions within specific time periods. First, the ISBTC was ordered to “take the necessary steps to have new, constitutional assessment regulations promulgated and in effect on or by June 1, 2001.”<sup>150</sup> Second, the tax court declared that “real property in Indiana must be reassessed using constitutional regulations as of March 1, 2002.”<sup>151</sup> The court emphasized that its “primary concern [was] to free all [Indiana] taxpayers from the burdens of having their properties assessed under an unconstitutional system.”<sup>152</sup> Moreover, the tax court reasoned that in establishing a reassessment deadline, it had balanced the ISBTC’s concerns regarding the time needed to implement a constitutional system with the constitutional rights of Indiana taxpayers.<sup>153</sup> Third, the court required the ISBTC to submit monthly detailed status reports beginning July 1, 2000, until further order of the court.<sup>154</sup> The tax court required that the reports inform the court as to the ISBTC’s progress with respect to meeting the established deadlines.<sup>155</sup> It also required that the ISBTC provide a copy of each status report to the petitioners.<sup>156</sup> The tax court additionally held that the petitioners would be permitted to file a response to each status report.<sup>157</sup>

The tax court declined the petitioners’ request that it appoint an independent commissioner to prepare new assessment regulations.<sup>158</sup> However, the court cautioned that should it find the ISBTC’s efforts deficient in any meaningful way, it would reconsider the petitioners’ suggestion to appoint an independent commissioner to draft new regulations, as well as any other appropriate relief.<sup>159</sup> The court also denied the petitioners’ requests to order the ISBTC to base its new regulations on objectively verifiable data and to adopt a single definition of property wealth.<sup>160</sup> In reaching its decision, the tax court reasoned that the ISBTC was guided by the prior decisions of both the supreme court and the tax court concerning the constitutional requirements of a system for assessment and

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150. *Id.* at 246. (citing IND. CODE §§ 4-22-2-23 to 4-22-2-36 (statutes governing the rulemaking process)).

151. *Id.* The tax court referred to its finding in *Town of St. John v. State Board of Tax Commissioners*, 691 N.E.2d 1387, 1389 (Ind. Tax Ct. 1998) (“*St. John IV*”): “In our legal system, constitutional rights are a categorical imperative, not a goal to be accomplished in the future.” In *St. John IV*, the tax court ordered the ISBTC to “consider all competent real world evidence presented to the State Board by persons filing appeals on or after May 11, 1999.” *Id.* at 1390. The supreme court reversed this order in *St. John V*, 702 N.E.2d 1034, 1043 (Ind. 1998).

152. *Sr. John VII*, 729 N.E.2d at 246.

153. *See id.*

154. *See id.* at 247.

155. *See id.*

156. *See id.*

157. *See id.*

158. *See id.* “[Indiana Trial Rule 53(A)] allows the [Tax] Court, with the concurrence of the Supreme Court, to appoint a commissioner in a pending case.” *Id.*

159. *See id.* at 247-48.

160. *See id.* at 248.



taxation of property.<sup>161</sup> The tax court deferred to the expertise of the ISBTC, allowing the ISBTC to determine how to adopt and implement new, constitutional assessment regulations by the deadlines imposed by the court.<sup>162</sup>

Finally, the court ruled that, in the interim, the following standards would govern real property tax assessments in Indiana:

(1) real property tax assessments shall be made in accordance with the current system; (2) any challenges to real property tax assessments shall be governed by existing law; and (3) real property tax assessments are not subject to challenge on the ground that the true tax value system violates the Indiana Constitution.<sup>163</sup>

In a related proceeding, *Town of St. John v. State Board of Tax Commissioners*,<sup>164</sup> the tax court considered adopting and applying the private attorney general exception to the American rule regarding litigation expenses and considered ordering the ISBTC to pay the petitioners' attorneys' fees and costs associated with the proceedings.<sup>165</sup> The court reasoned that, given the extraordinary circumstances of the case, a fee award was both appropriate and justified.<sup>166</sup> Consequently, the tax court ordered the ISBTC to pay reasonable attorneys' fees and costs to the petitioners' counsel.<sup>167</sup>

In reaching its decision on this issue of first impression, the court surveyed a wide array of case law and discussed the United States Supreme Court's view of the private attorney general exception, Indiana decisions recognizing the exception, the decisions of jurisdictions that have adopted and applied the exception, and the decisions of jurisdictions declining to adopt the exception.<sup>168</sup>

The tax court first discussed the United States Supreme Court ruling, in *Alyeska Pipeline Service Co. v. Wilderness Society*.<sup>169</sup> The Supreme Court in *Alyeska Pipeline* held that federal courts could not award attorneys' fees using the private attorney general exception.<sup>170</sup> The Supreme Court explained that, under the American rule, "the prevailing litigant is ordinarily not entitled to

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161. *See id.*

162. *See id.* at 250.

163. *Id.* at 251.

164. 730 N.E.2d 240 (Ind. Tax Ct. 2000).

165. *See id.* at 242. "The American rule is the 'requirement that each litigant must pay its own attorney's fees, even if the party prevails in the lawsuit,'" and the "traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization" *Id.* at 242 n.1 (citations omitted).

166. *See id.* at 242.

167. *See id.* On September 15, 2000, the Indiana Supreme Court granted review for further consideration of this issue. *See Town of St. John v. State Bd. of Tax Comm'rs*, No. 49S10-0009-TA-541, 2000 Ind. LEXIS 926 (Sept. 15, 2000).

168. *See Town of St. John*, 730 N.E.2d at 242-56.

169. 421 U.S. 240 (1975).

170. *See id.*



collect a reasonable attorneys' fee from the loser."<sup>171</sup> The tax court explained the Supreme Court's rejection of the private attorney general exception as follows:

(1) Congress has reserved the right to allow attorneys' fees only under certain circumstances; (2) specific exceptions to the American rule are expressly identified in statute; and (3) without legislative guidance, federal courts may not selectively create new exceptions to the American rule based upon the alleged importance of the public policies at issue.<sup>172</sup>

Next, the tax court looked to the opinions and decisions of Indiana courts concerning the application of the American rule when deciding whether or not to award attorneys' fees. The court noted the Indiana Supreme Court's observation "that the 'right to recover attorney's fees from one's opponent does not exist in the absence of a statute or some agreement, though a court of equity may, under some circumstances, allow attorneys' fees to be paid out of a fund brought under its control.'"<sup>173</sup>

The private attorney general exception was first recognized in Indiana by the court of appeals in *Saint Joseph's College v. Morrison, Inc.*<sup>174</sup> In *Saint Joseph's College*, the court of appeals held that certain limited exceptions to the American rule exist.<sup>175</sup> The court of appeals recognized three exceptions to the rule that each party must pay his own attorney fees: the obdurate behavior exception; the common fund exception; and, the private attorney general exception.<sup>176</sup> However, the court of appeals held that the private attorney general exception only applied where the party acting in the private attorney general capacity was authorized to do so by statute.<sup>177</sup>

In sum, the tax court determined that the Indiana Supreme Court had not acknowledged the private attorney general exception to the American rule.<sup>178</sup> Moreover, the tax court observed that while the court of appeals had acknowledged the exception on various occasions, it had never supported an award of attorneys' fees using the exception.<sup>179</sup>

The tax court then examined how other jurisdictions treat the private attorney general exception. First, the court reviewed the holdings of jurisdictions that had applied the exception to award attorneys' fees. In *Serrano v. Priest*,<sup>180</sup> the seminal case adopting the exception, the California Supreme Court identified

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171. *Id.* at 247.

172. *Town of St. John*, 730 N.E.2d at 244.

173. *Id.* (quoting *Gavin v. Miller*, 54 N.E.2d 277, 280 (Ind. 1944)).

174. 302 N.E.2d 865, 870 (Ind. Ct. App. 1973). *See also* *Morgan County v. Ferguson*, 712 N.E.2d 1038 (Ind. Ct. App. 1999); *Downing v. City of Columbus*, 505 N.E.2d 841 (Ind. Ct. App. 1987).

175. *See id.*

176. *See id.*; *see also* *Ferguson*, 712 N.E.2d at 1044-45.

177. *See id.*; *see also* *Ferguson*, 712 N.E.2d at 1044-45.

178. *See Town of St. John*, 730 N.E.2d at 247.

179. *See id.*

180. 569 P.2d 1303 (Cal. 1977).



three basic factors to be considered in awarding fees under the private attorney general exception: "(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, (3) the number of people standing to benefit from the decision."<sup>181</sup> The tax court observed that "[s]tate courts have applied the private attorney general exception under various factual situations to enforce citizens' constitutional and statutory rights against violations of those rights committed by state and local governments."<sup>182</sup> However, the court noted that those jurisdictions still adhere to the American rule and only rarely apply the private attorney general exception.<sup>183</sup> The tax court concluded that the award of attorneys' fees using the exception was always fact specific and that courts tend to weigh the three factors from *Serrano* in deciding whether to award fees.<sup>184</sup>

Next, the tax court examined the rationales of the jurisdictions that have rejected the adoption and application of the private attorney general exception. The court referred to an opinion from the Supreme Court of New Mexico, *New Mexico Right to Choose/NARAL v. Johnson*.<sup>185</sup> In *Johnson*, the Supreme Court of New Mexico concluded that the state's constitutional jurisprudence did "not provide a basis for concluding that the American rule [was] 'so unworkable as to be intolerable.'"<sup>186</sup> The tax court summarized the exceptions discussed by the *Johnson* court as those "arising: (1) from a court's inherent powers to sanction the bad faith conduct of litigants and attorneys; (2) from certain exercises of a court's equitable powers; and (3) simultaneously from judicial and legislative powers."<sup>187</sup> The tax court concluded that courts refusing to adopt the private attorney general exception strictly adhere to the American rule and that tend to emphasize the lack of statutory authorization to award fees using the exception.<sup>188</sup> The court found that in applying the United States Supreme Court's rationale from *Alyeska Pipeline*, "these courts also express reluctance to weigh the relative societal importance of individuals' rights and legislative policies."<sup>189</sup>

Although the tax court found some merit in the arguments rejecting the private attorney general exception, the court adopted and applied the exception and awarded attorneys' fees to the town of St. John.<sup>190</sup> The tax court reasoned that "[a]lthough the Indiana Supreme Court has yet to recognize the private attorney general exception, the Indiana Court of Appeals has recognized the

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181. *Id.* at 1314.

182. *Town of St. John*, 730 N.E.2d at 251.

183. *See id.*

184. *See id.*

185. 986 P.2d 450 (N.M. 1999).

186. *Id.* at 454 (citation omitted).

187. *Town of St. John*, 730 N.E.2d at 252-53 (citation omitted).

188. *See id.* at 256.

189. *Id.*

190. *See id.*



exception no fewer than sixteen times since 1973.”<sup>191</sup> Additionally, the tax court held that two disapproving Indiana courts never rejected the existence of the exception; rather, the courts rejected its application to the specific facts under consideration at the time.<sup>192</sup>

In applying the private attorney general exception in *Town of St. John*, the court adopted the three-factor inquiry announced in *Serrano*.<sup>193</sup> First, the tax court concluded that the petitioners had “vindicated a constitutional principle of substantial importance.”<sup>194</sup> The court determined that the burden on the petitioners’ time and resources in prosecuting their constitutional challenge over the past seven years had been immense.<sup>195</sup> The court recognized that the petitioners were represented by the not-for-profit Indiana Civil Liberties Union (ICLU) and four private attorneys who had not collected any fees from the petitioners, but had incurred more than sixty thousand dollars in out-of-pocket expenses.<sup>196</sup> The court concluded that to dismiss the burden of the ICLU in many instances “would trivialize the efforts of counsel in enforcing the state constitution and would ignore the fact that, in many instances, only public interest firms or entities are prepared for and willing to challenge constitutional violations.”<sup>197</sup> Second, the court observed that the supreme court’s opinion underscored the need for private enforcement in the case when the supreme court concluded that the Property Taxation Clause did not “create a personal, substantive right of uniformity and equality. . . . It does not establish an entitlement to individual assessments for abstract evaluation of property wealth, nor does it mandate the consideration of independent property wealth evidence in individual assessments or tax appeals.”<sup>198</sup> Third, the tax court found that all Indiana citizens, either directly or indirectly, would potentially benefit from the outcome of this case.<sup>199</sup> The tax court agreed with the petitioners and found that the benefits of the litigation include: “(1) an end to arbitrary assessments; (2) abandonment of a self-referential system in favor of one using objectively verifiable data; (3) greater accuracy of assessments; (4) equality of assessments among various jurisdictions throughout the state; (5) equality of taxation among various classes of property; (6) improved assessment appeals; and (7) equity for

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191. *Id.*

192. *See id.* One court stated: “We see nothing in the record which would indicate that [the exception] would apply in this case.” *Id.* (quoting *Downing v. City of Columbus*, 505 N.E.2d 841, 845 (Ind. Ct. App. 1987)). The other stated: “Here, there is no basis for an award of attorney fees or costs.” *Id.* (quoting *Morgan County v. Ferguson*, 712 N.E.2d 1038, 1045 (Ind. Ct. App. 1999)).

193. *See id.*

194. *Id.*

195. *See id.* at 257.

196. *See id.* at 258.

197. *Id.* at 259 (citing *Serrano v. Priest*, 569 P.2d 1310, 1316 (Cal. 1997) (“stating that denial of fees to attorneys in public interest firms would be ‘essentially inconsistent’ with the private attorney general theory”)).

198. *Id.* (quoting *St. John V.*, 702 N.E.2d 1034, 1040 (Ind. 1998)).

199. *See id.*



taxing bodies."<sup>200</sup> Since the petitioners fulfilled the three-pronged *Serrano* test, the tax court awarded them attorneys' fees under the private attorney general exception.<sup>201</sup>

The tax court rejected the ISBTC's claim of sovereign immunity.<sup>202</sup> The court also rejected the ISBTC's contentions that "fee-shifting is a legislative matter, that the General Assembly knows how to and has enacted numerous fee-shifting statutes and that adopting the exception will result in problematic ranking of rights between allegedly fee-meriting and non-fee-meriting claims."<sup>203</sup> The tax court also declared that it would not deny an appropriate fee award in the case "out of fear that it will be asked to exercise its analytical skills in future cases to determine whether those particular cases reflect equally extraordinary circumstances."<sup>204</sup> Finally, the court rejected the ISBTC's contention that even if the private attorney general theory was recognized and adopted, the theory did not apply in that case.<sup>205</sup> Nonetheless, the court found that a constitutional taxation and assessment system would benefit all real property taxpayers, including both business and residential property owners.<sup>206</sup> The court reiterated: "In our legal system, constitutional rights are a categorical imperative."<sup>207</sup> In sum, the tax court determined that the private attorney general exception should be recognized, and awarded reasonable attorneys' fees and costs to the petitioners.<sup>208</sup>

2. *Rinker Boat Co. v. State Board of Tax Commissioners*.<sup>209</sup>—*Rinker Boat Co.*, the owner of a boat manufacturing plant located in Kosciusko County, Indiana, challenged the ISBTC's denial of adjustments in assessing real property tax against *Rinker Boat Company, Inc.* (taxpayer).<sup>210</sup> The tax court affirmed the final determination of the ISBTC in part, reversed in part, and remanded the case to the ISBTC for a determination of the type of heating, lighting, interior partitions, and exterior walls (of which the taxpayer's building consisted) and for a determination of the appropriate obsolescence factor to be applied to the taxpayer's building.<sup>211</sup>

The first issue the tax court addressed was the ISBTC's contention that the

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200. *Id.* at 259-60.

201. *See id.* at 260.

202. *See id.* The ISBTC cited article X, section three, of the Indiana Constitution, which provides: "No money shall be drawn from the Treasury, but in pursuance of appropriations made by law." *Id.*

203. *Id.* at 261.

204. *Id.* at 263.

205. *See id.*

206. *See id.*

207. *Id.* at 263-264 (citation omitted).

208. *See id.*

209. 722 N.E.2d 919 (Ind. Tax Ct. 1999).

210. *See id.* at 920.

211. *See id.* at 925-26.



taxpayer used the wrong ISBTC form to challenge the assessment.<sup>212</sup> Specifically, the ISBTC refused to consider the taxpayer's Petition for Correction of Error (ISBTC Form 133), which dealt with the heating, lighting, interior partitions, and exterior walls of the taxpayer's building, because the ISBTC believed that the issues raised by the taxpayer on that form could only be considered on a Petition for Review of Assessment (ISBTC Form 131).<sup>213</sup> The tax court agreed with the ISBTC's statements concerning the uses of each of these forms; however, the tax court found that the type of the heating and lighting equipment, the amount of interior partitions, and the composition of the exterior walls of the taxpayer's building were objective determinations, and therefore, could be raised on an ISBTC Form 133.<sup>214</sup>

Having disposed of the above procedural issue, the tax court next considered whether or not the ISBTC substantively erred when the ISBTC assessed the taxpayer's property as having certain types of heating, lighting, interior partition walls, and exterior walls. Contrary to its final determination, the ISBTC conceded that the taxpayer used unit heaters instead of forced-air heating equipment, the taxpayer used fluorescent rather than high-intensity lighting, the ISBTC assessed the taxpayer for nonexistent partitioning, and the composition of the exterior walls of the taxpayer's building was not the composition on which the ISBTC's assessment was based.<sup>215</sup> Consequently, the tax court held that each of the above-referenced determinations by the ISBTC was arbitrary and capricious.<sup>216</sup> Moreover, the court found that each assessment was an error as a matter of law that could be corrected on an ISBTC Form 133.<sup>217</sup> The tax court remanded these issues to the ISBTC and indicated that upon remand, the taxpayer has the "burden of proof to ascertain the cost of each component described above based on the regulations."<sup>218</sup> The tax court found that if the cost must be accounted for by grade or other subjective factors, then the appeal must fail with respect to such items, because then, review of the ISBTC Form 133 would require a subjective judgment, which is not permitted.<sup>219</sup> However, the tax court held that the grade and other subjective factors concerning the taxpayer's

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212. See *id.* at 921. The taxpayer filed a Form 133 Petition for Correction of Error in order to challenge the ISBTC's assessment of the taxpayer's heating, lighting, interior partitions, and exterior walls. In addition, the taxpayer filed a Form 131 Petition for Review of Assessment in order to challenge the same assessment, to challenge the ISBTC's classification of the taxpayer's building, and to challenge the ISBTC's adjustment for obsolescence depreciation. See *id.*

213. See *id.*; see also IND. CODE § 6-1.1-15-12 (2000); *Barth, Inc. v. State Bd. of Tax Comm'rs*, 699 N.E.2d 800, 806 (Ind. Tax Ct. 1998) (holding that only objective errors may be corrected on an ISBTC Form 133).

214. See *Rinker Boat Co.*, 722 N.E.2d at 922.

215. See *id.* at 922-23.

216. See *id.*

217. See *id.* at 923.

218. *Id.* at 923-24.

219. See *id.* at 924.



building could be used if necessary on remand.<sup>220</sup>

The tax court then considered the taxpayer's challenges to both the classification of the taxpayer's building and the ISBTC's finding of no obsolescence on the taxpayer's Form 131.<sup>221</sup> The tax court found that because a Form 131 may require a subjective determination by the ISBTC, the ISBTC is given a great deal of discretion.<sup>222</sup> Notwithstanding this deference, the court held that the ISBTC must provide some reasoning to support its determination.<sup>223</sup> The court also found that the ISBTC is "obligated to consider evidence presented by the taxpayer and to deal with that evidence in a meaningful manner."<sup>224</sup> The tax court noted: "In order to successfully challenge a final determination, the taxpayer will usually have to offer a competing view, along with evidence to support that view, of what the assessment should be."<sup>225</sup> The court concluded that in order to meet this burden, "a taxpayer must present a *prima facie* case supported by probative evidence."<sup>226</sup>

Next, the tax court considered the interior features of the taxpayer's building. The tax court found that the ISBTC assessed the taxpayer's building as a light manufacturing facility as opposed to a small shop facility despite the fact that the taxpayer's building seemed to more closely resemble the small shop model.<sup>227</sup> However, the tax court found that the taxpayer failed to present any additional evidence comparing the remaining attributes of its building with each model and therefore did not carry its burden of proof on the issue.<sup>228</sup> Consequently, the tax court affirmed the ISBTC's classification of the taxpayer's building as a light manufacturing facility.<sup>229</sup>

Finally, the tax court considered the taxpayer's challenge to the ISBTC's application of a zero obsolescence factor to the taxpayer's building. The court explained that the determination of obsolescence is a two-step inquiry, and noted that the appealing party must first identify the causes of obsolescence and then quantify the amount of obsolescence to be applied.<sup>230</sup> The court held that "[f]unctional obsolescence is either something that buyers are unwilling to pay for or a deficiency that causes the property to lose value when compared to a more modern replacement."<sup>231</sup> The tax court found that functional obsolescence works as a penalty against the property's value, and provided several examples of functional obsolescence, including "a poor ratio of land to building area,

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220. *See id.*

221. *See id.*

222. *See id.*

223. *See id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *See id.*; *see also* IND. ADMIN. CODE tit. 50, r. 2.2-11-1 (2001).

228. *See id.*

229. *See id.*

230. *See id.* at 925.

231. *Id.* *See also* IND. ADMIN. CODE tit 50, r. 2.2-10-7 (2001).



inadequate parking, truck or railroad loading or unloading facilities and poor proportion of office, rental or manufacturing, and warehouse space."<sup>232</sup>

The tax court contrasted the evidence presented by the taxpayer with the ISBTC's claim that no deduction was allowed for obsolescence because the ISBTC "felt that [the taxpayer's] building was being operated for its intended purpose of boat building."<sup>233</sup> The tax court held that in order to establish a prima facie case, a taxpayer must introduce evidence "sufficient to establish a given fact and which if not contradicted will remain sufficient."<sup>234</sup> The tax court indicated that "[o]nce the taxpayer does so, it is then incumbent upon the [ISBTC] to rebut this evidence and support its decision with substantial evidence."<sup>235</sup> The tax court observed that while some of the taxpayer's evidence may have appeared to be the mere identification of factors that cause obsolescence, the taxpayer had done more than make bare allegations, and therefore, met its prima facie case requirements.<sup>236</sup> Moreover, the tax court found that "the [ISBTC] has neither rebutted the evidence offered by [the taxpayer] nor dealt with it in a meaningful manner."<sup>237</sup> As a result, the tax court remanded this issue to the ISBTC.<sup>238</sup>

3. *Indianapolis Racquet Club, Inc. v. State Board of Tax Commissioners.*<sup>239</sup>—In *Indianapolis Racquet Club, Inc.*, the owner of an indoor and outdoor tennis facility and the owner of an office building complex, both located in Marion County, Indiana, challenged the validity of the ISBTC's assessments of their real property. Indianapolis Racquet Club, Inc. (IRC) and Racquet Square Associates, Ltd. (RSA) (taxpayers) presented two issues for consideration by the tax court, which arose from the assessment of three individual parcels consisting of eight outdoor tennis courts, sixteen indoor tennis courts and associated facilities, and three single-story office buildings.<sup>240</sup> In this case, the tax court reversed the ISBTC's final assessment determinations and remanded the case to the ISBTC because the relevant statutory factors were not considered by the ISBTC when it classified the property.<sup>241</sup> In addition, the court instructed the ISBTC to apply the model that most closely resembled the tennis facility and to recalculate the reproduction costs of the tennis facility based upon the proper model.<sup>242</sup>

The tax court referred to *Indianapolis Historic Partners v. State Board of*

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232. *Id.*

233. *Id.*

234. *Id.* (quoting *Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230, 1233 (Ind. Tax Ct. 1998)).

235. *Id.*

236. *See id.*

237. *Id.*

238. *See id.*

239. 722 N.E.2d 926, 928 (Ind. Tax Ct. 2000) *remanded by* 743 N.E.2d 247 (Ind. 2001).

240. *See id.* at 929.

241. *See id.* at 941.

242. *See id.*



*Tax Commissioners*, where the tax court held that the Property Tax Clause of the Indiana Constitution requires "(1) uniformity and equality in assessment, (2) uniformity and equality as to rate of taxation, and (3) a just valuation for taxation of all property. . . . The purpose of these constitutional requirements is to distribute the burden of taxation upon principles of uniformity, equality, and justice."<sup>243</sup> The court also observed that the General Assembly has charged the ISBTC with interpreting Indiana's property tax laws and ensuring that all property assessments are made as prescribed by law.<sup>244</sup> Specifically, the tax court observed that section 6-1.1-31-6 of the Indiana Code provides mandatory guidelines for the ISBTC to follow when establishing rules governing the assessment of real property.<sup>245</sup> The court found that in fulfilling its duties, the ISBTC is afforded a great deal of discretion and that part of exercising its discretion is promulgating land valuation orders, which are administrative rules.<sup>246</sup>

The tax court held that the taxpayers had to show that the land valuation commission's classification of the real property was improper.<sup>247</sup> The court reviewed the statutory language and concluded that the most logical interpretation of section 6-1.1-31-6 of the Indiana Code was that the General Assembly intended for the ISBTC to consider all the listed factors, including land orders, when promulgating a rule.<sup>248</sup> Therefore, the court found that:

[I]n placing a particular parcel within a specific category of a land valuation order, the [ISBTC], in either approving or modifying the land order or in reviewing an assessment on appeal, must consider these statutory factors: acreage, lots, size, location, use, productivity or earning capacity, applicable zoning provisions, and accessibility to highways, sewers, and others public services or facilities.<sup>249</sup>

The final factor of the above-referenced statutory provision allows the ISBTC to consider "any other factor that the [State Board] determines by rule is just and proper."<sup>250</sup>

The tax court reviewed the evidence in the case and concluded that because the listed factors were not considered by the ISBTC, it was necessary to remand the issue of whether the parcels were properly classified.<sup>251</sup> The court instructed that on remand the ISBTC must determine, upon considering all factors required by section 6-1.1-31-6 of the Indiana Code, the appropriate classification of the

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243. *Id.* at 931 (quoting *Indianapolis Historic Partners v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1224, 1228 (Ind. Tax Ct. 1998)).

244. *See id.* at 931; *see also* IND. CODE § 6-1.1-35-1 (2000).

245. *See Indianapolis Racquet Club, Inc.*, 722 N.E.2d at 931.

246. *See id.*

247. *See id.* at 932.

248. *See id.* at 933.

249. *Id.*

250. *Id.* (quoting IND. CODE § 6-1.1-31-6(a)(1)(ix) (1989)).

251. *See id.* at 935.



parcels.<sup>252</sup> Moreover, the court held that the ISBTC must determine the appropriate base rate within the proper classification.<sup>253</sup>

The next issue addressed in *Indianapolis Racquet Club* was whether the base rate for ninety percent of the taxpayers' indoor tennis facility was correctly determined using the General Commercial Mercantile (GCM) health club model instead of the General Commercial Industrial (GCI) light warehouse model.<sup>254</sup> The tax court emphasized that "IRC was entitled to have its property assessed using the correct cost schedule."<sup>255</sup> However, the court noted that a classification for taxation purposes is valid when it rests on a reasonable basis of actual difference between those included and those excluded.<sup>256</sup> Moreover, the court noted that because a building may not conform perfectly with model specifications, a hearing officer must use subjective judgment to decide which model the building most closely resembles, and that the hearing officer is allowed some discretion in selecting which model to use.<sup>257</sup>

The tax court found that "IRC had an affirmative duty to present evidence showing that the [ISBTC] abused its discretion in selecting the health club model."<sup>258</sup> The court found that IRC established that ninety percent of the tennis facility in dispute lacked a substantial number of features described in the health club model.<sup>259</sup> Consequently, the court held that the ISBTC's application of the health club model to ninety percent of the tennis facility under consideration was not supported by substantial evidence.<sup>260</sup> In fact, the court found that the evidence showed the tennis facility's features better matched those of the light warehouse model than those of the health club model.<sup>261</sup> Therefore, the tax court determined that IRC had carried its burden of showing that the ISBTC "abused its discretion by applying the wrong model in assessing the tennis facility."<sup>262</sup> The court also concluded that the ISBTC "abused its discretion by applying the health club model in determining the tennis facility's reproduction cost."<sup>263</sup> Upon remand, the court instructed the ISBTC to "apply the model that most closely resembles the physical structure of the tennis facility area being considered and recalculate the facility's reproduction costs based upon that model."<sup>264</sup>

In sum, the tax court advised that, on remand, RSA had the burden of going

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252. See *id.*

253. See *id.*

254. See *id.*

255. *Id.* at 937.

256. See *id.*

257. See *id.*

258. *Id.* at 939.

259. See *id.*

260. See *id.*

261. See *id.*

262. *Id.*

263. *Id.* at 941.

264. *Id.*



forward with probative evidence about the proper classification of the parcels and the proper base rate to be assigned the parcels.<sup>265</sup> The tax court also found that IRC must present "probative evidence concerning the appropriate model to use in calculating the base rate for the [ninety percent] of its indoor tennis facility at issue, including but not limited to evidence regarding the proper grade to be assigned the [indoor tennis facility]."<sup>266</sup>

4. *CDI, Inc. v. State Board of Tax Commissioners*.<sup>267</sup>—CDI, Inc., the owner of a truck warehouse located in Vigo County, Indiana, sought an adjustment to its real property tax assessment.<sup>268</sup> In this case, the tax court ruled against the property owner and affirmed the final determinations of the ISBTC.<sup>269</sup>

The first issue was whether the ISBTC exceeded its legislative authority in conducting a hearing because the ISBTC failed to issue a letter of appointment to its hearing officer. There was no evidence in the record that CDI, Inc. (taxpayer) objected (at the administrative level) to the hearing officer's authority to hear the taxpayer's appeal.<sup>270</sup> Thus, the tax court held that the taxpayer had waived the issue and could not raise it for the first time before the tax court.<sup>271</sup>

The tax court also found that the taxpayer failed to point to probative evidence of record that indicated what the correct grade should be or whether the structure was a kit building. Therefore, the tax court rejected the taxpayer's arguments concerning the grade assigned to the warehouse and kit building adjustments.<sup>272</sup> The court held that "[w]hen a taxpayer contests the grade assigned an improvement, the taxpayer must offer probative evidence concerning the alleged assessment error."<sup>273</sup> The tax court determined that "[w]here the taxpayer fails to provide the [ISBTC] with probative evidence supporting its position on the grade issue, the [ISBTC's] duty to support its final determination with substantial evidence is not triggered."<sup>274</sup> In addition, the court explained that "a taxpayer must provide the [ISBTC] with probative evidence as to whether an improvement qualifies as a kit building."<sup>275</sup> The court advised that "with the

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265. *See id.*

266. *Id.*

267. 725 N.E.2d 1015 (Ind. Tax Ct. 2000).

268. *See id.* at 1017.

269. *See id.* at 1022.

270. *See id.* at 1018.

271. *See id.*

272. *See id.* at 1019; *see also* IND. ADMIN. CODE tit. 50, r. 2.2-10-3 (2000).

273. *CDI, Inc.*, 725 N.E.2d at 1019.

274. *Id.*

275. *Id.* The court referred to a previous decision where it held:

[I]t is incumbent upon the taxpayer to offer evidence tending to show the improvement qualifies for the kit adjustment. If the taxpayer fails to do so, the taxpayer's claim fails. This is not an onerous burden. . . . Instructional Bulletin 91-8 outlines a large number of specific characteristics of kit buildings. Accordingly, it should not be difficult for taxpayers to identify those characteristics in an improvement alleged to qualify for the kit adjustment.



issue of grade, the [ISBTC] is not required to support its denial of the kit building adjustment until the taxpayer comes forward with probative evidence demonstrating that it is entitled to the adjustment."<sup>276</sup>

The tax court found that in this case the taxpayer failed to present probative evidence regarding either the grade assignment or kit building adjustments for the warehouse.<sup>277</sup> Therefore, the court held that the ISBTC had no duty to refute the taxpayer's arguments with a competing view.<sup>278</sup> Consequently, the court did not consider whether substantial evidence supported the ISBTC's grading of the warehouse or its refusal to grant the warehouse a kit building adjustment.<sup>279</sup>

Finally, the tax court declined to address the merits of the taxpayer's argument concerning the use of a particular economic life table in determining the warehouse's physical depreciation.<sup>280</sup> The court held that a taxpayer may not secure the reversal of a final determination regarding a structure's physical depreciation simply by alleging an inadequacy in the regulations governing physical depreciation in general and the selection of the appropriate economic life table specifically.<sup>281</sup> Rather, the taxpayer must offer probative evidence regarding the purported error.<sup>282</sup> Because the taxpayer failed to present probative evidence regarding which economic life table is applicable, the court held that "the [ISBTC's] duty to develop and support a competing view of the proper assessment was never triggered."<sup>283</sup>

5. *Kemp v. State Board of Tax Commissioners*.<sup>284</sup>—In *Kemp*, the owners of residential real estate located in LaPorte County, Indiana, appealed the ISBTC's denial of their request to lower the assessed value of their residence.<sup>285</sup> The tax court ruled against the property owners and affirmed the ISBTC's final determination.<sup>286</sup>

The tax court first addressed whether the ISBTC exceeded its legislative authority in conducting a hearing without having first issued a letter of appointment to its hearing officer. The tax court found that there was no evidence in the record that the Kemps (taxpayers) had objected to the hearing

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*Id.* (citing *Whitley Prods., Inc. v. State Bd. of Tax Comm'rs*, 704 N.E.2d 1113, 1121 (Ind. Tax Ct. 1998)).

276. *Id.* at 1020.

277. *See id.* at 1021.

278. *See id.*

279. *See id.*

280. *See id.* at 1021-22.

281. *See id.* at 1022.

282. *See id.*

283. *Id.* *See also* *Whitley Prods., Inc. v. State Bd. of Tax Comm'rs*, 704 N.E.2d 1113, 1119-20 (Ind. Tax Ct. 1998); *King Indus. Corp. v. State Bd. of Tax Comm'rs*, 699 N.E.2d 338, 343 (Ind. Tax Ct. 1998).

284. 726 N.E.2d 395 (Ind. Tax Ct. 2000).

285. *See id.* at 398.

286. *See id.* at 404.



officer's authority at the administrative level to hear the taxpayers' appeal.<sup>287</sup> Thus, the court held that the taxpayers waived the issue and could not raise it for the first time in their original tax appeal.<sup>288</sup>

The tax court next addressed whether the ISBTC properly assigned a "B" grade to the taxpayers' residence. The court reviewed the assignment of grades under the true tax value system in Indiana and noted that "improvements are assigned various grades based on their materials, design and workmanship."<sup>289</sup> The court found that "the grades represent multipliers that are applied to the base reproduction cost of an improvement,"<sup>290</sup> and further explained that "[w]hen contesting the grade assigned an improvement, a taxpayer must offer probative evidence concerning the alleged assessment error."<sup>291</sup> The tax court held that "a taxpayer's conclusory statements do not constitute probative evidence concerning the grading of the subject improvement."<sup>292</sup> The court also held: "Mere references to photographs or regulations, without explanation, do not qualify as probative evidence."<sup>293</sup> The court explained that when the taxpayer fails to provide the ISBTC with probative evidence supporting its position on the grade issue, the ISBTC's duty to support its final determination with substantial evidence is not triggered.<sup>294</sup>

After a review of the evidence presented in the case, the tax court found that the taxpayers failed to submit probative evidence on the issue of grade to the ISBTC.<sup>295</sup> Moreover, the court found that the opinion testimony presented in the case amounted to conclusory statements that did not qualify as probative evidence.<sup>296</sup> The court explained that the ISBTC had no duty to make the taxpayers' case for them and that it was the taxpayers' obligation to substantiate their claims with probative evidence before the ISBTC, but because the taxpayers failed to do so, they did not meet their burden of production.<sup>297</sup> Therefore, the tax court held that the duty of the ISBTC to substantiate its final determination on the grade issue was never triggered.<sup>298</sup>

The final issue addressed in *Kemp* was whether the ISBTC's regulations, as applied to the assessment of the taxpayers' property, produced an inequitable and unjust assessment in violation of the Property Tax Clause of the Indiana Constitution.<sup>299</sup> The tax court found that a taxpayer must present specific

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287. *See id.* at 399.

288. *See id.*

289. *Id.* at 400. *See also* IND. ADMIN. CODE, tit. 50, r. 2.2-10-3 (2001).

290. *Kemp*, 726 N.E.2d at 400.

291. *Id.*

292. *Id.*

293. *Id.*

294. *See id.*

295. *See id.* at 401.

296. *See id.*

297. *See id.*

298. *See id.*

299. *See id.* at 401-02.



evidence that the assessment is unconstitutional as applied to the taxpayer for the challenge to succeed.<sup>300</sup> The court acknowledged that an application of regulations in an unconstitutional manner by the ISBTC constitutes an abuse of discretion.<sup>301</sup>

In making its determination, the tax court considered whether the taxpayers were entitled to an obsolescence adjustment for their home.<sup>302</sup> The court explained that obsolescence is the "diminishing of a property's desirability and usefulness brought about by either functional inadequacies or overadequacies inherent in the property itself, or adverse economic factors external to the property."<sup>303</sup> The court observed that the regulations recognize both functional and economic obsolescence<sup>304</sup> and explained: "Functional obsolescence is caused by internal factors. Economic obsolescence is caused by external factors."<sup>305</sup> The tax court explained that the determination of obsolescence is a two-step process requiring an assessor to identify causes of obsolescence first and then quantify the amount of obsolescence to be applied.<sup>306</sup> The tax court noted that the regulations indicate that, "[o]bsolescence depreciation is seldom applied to residential dwellings. There must be an extremely abnormal circumstance involved with a residential dwelling before obsolescence depreciation applies."<sup>307</sup> The tax court required that in order to obtain an obsolescence adjustment, the taxpayers had the burden to produce evidence showing that their home suffered from an extremely abnormal circumstance.<sup>308</sup>

The tax court found that the taxpayers failed to introduce any evidence at the administrative hearing showing that an extremely abnormal circumstance was present in their home that justified application of an obsolescence adjustment.<sup>309</sup> Further, the tax court found that the taxpayers failed to identify any causes of obsolescence.<sup>310</sup> Therefore, the tax court held that the ISBTC correctly denied

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300. See *id.* at 402.

301. See *id.*

302. See *id.*

303. *Id.* (quoting IND. ADMIN. CODE., tit. 50, r. 2.2-1-40 (1996)).

304. See *id.* (citing IND. ADMIN. CODE., tit. 50, r. 2.2-10-7(e) (1996)).

305. *Id.* (quoting IND. ADMIN. CODE., tit. 50, r. 2.2-10-7(e) (1996)).

Functional obsolescence has numerous possible causes, including: (1) inefficient floor plans; (2) unnecessary or superadequate construction; (3) inadequate parking; and (4) mechanical inadequacy. Possible causes of economic obsolescence include: (1) inoperative or inadequate zoning ordinances; (2) deed restrictions; and (3) market acceptability of the product or devices for which the property was constructed or is currently used.

*Id.* (citing *Pedcor Invs.-1990-XIII L.P. v. State Bd. of Tax Comm'rs*, 715 N.E.2d 432, 435 (Ind. Tax Ct. 1999)).

306. See *id.*

307. *Id.* (quoting IND. ADMIN. CODE, tit. 50, r. 2.2-7-9(d) (1996)).

308. See *id.*

309. See *id.* at 402-03.

310. See *id.* at 403.



the taxpayers an obsolescence adjustment for their home.<sup>311</sup>

The taxpayers also failed to persuade the tax court that a sales ratio study based on market values could validly demonstrate the alleged inequity of Indiana's system of assessments.<sup>312</sup> The tax court found that "the [ISBTC] is required to deal with a taxpayer's evidence in a meaningful manner, but only if the evidence has probative value."<sup>313</sup> In this case, the court found that the taxpayers failed to demonstrate that the market data study they presented was relevant in determining their assessment's correctness.<sup>314</sup> Therefore, the tax court held that the ISBTC did not abuse its discretion by refusing to consider the market data study.<sup>315</sup> The court observed that the market data study "was the only evidence provided by the [taxpayers] supporting their constitutional claim. Without it, [the taxpayers] lacked any specific evidence showing that the [ISBTC's] regulations, as applied, violated their rights to a uniform and equal assessment under the Indiana Constitution."<sup>316</sup> Therefore, the tax court rejected the taxpayers final claim.<sup>317</sup>

6. *Bernacchi v. State Board of Tax Commissioners*.<sup>318</sup>—In *Bernacchi*, the owners of residential real estate located in LaPorte County, Indiana, appealed the final determination of the ISBTC denying their request to lower the assessed value of their residence.<sup>319</sup> In this case, the tax court affirmed the ISBTC's final determination in this case.<sup>320</sup>

The first issue the tax court addressed was whether the ISBTC exceeded its legislative authority in conducting a hearing in this matter without issuing a letter of appointment to its hearing officer. The tax court concluded that there was no evidence in the record that the Bernacchis (taxpayers) objected to the hearing officer's authority at the administrative level to hear the taxpayers' appeal.<sup>321</sup> Thus, the tax court held that the taxpayers waived the issue and could not raise it for the first time in its original tax appeal.<sup>322</sup>

Next, the tax court addressed whether the ISBTC board properly assigned a "B" plus two grade to the taxpayers' residence. After a review of the evidence presented in this case, the tax court found that the taxpayers failed to submit probative evidence on the issue of grade to the ISBTC and that in the absence of probative evidence, the taxpayers failed to meet their burden of production.<sup>323</sup>

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311. *See id.*

312. *See id.*

313. *Id.* at 404.

314. *See id.*

315. *See id.*

316. *Id.*

317. *See id.*

318. 727 N.E.2d 1133 (Ind. Tax Ct. 2000).

319. *See id.* at 1134.

320. *See id.* at 1138.

321. *See id.* at 1135.

322. *See id.*

323. *See id.* at 1136.



Therefore, the tax court held that the ISBTC's duty to substantiate its final determination on the issue of grade was never triggered and affirmed the final determination of the ISBTC with respect to the grade assigned to the taxpayers' residence.<sup>324</sup>

The final issue addressed in *Bernacchi* was whether the ISBTC's regulations, as applied to the assessment of the taxpayers' property, produced an inequitable and unjust assessment in violation of the Property Tax Clause of the Indiana Constitution.<sup>325</sup> The tax court held that "[i]n order for such a challenge to succeed, a taxpayer must present specific evidence that an assessment is unconstitutional as applied to him."<sup>326</sup> In analyzing this issue, the court first considered whether the taxpayers were entitled to an obsolescence adjustment for their residence. To obtain an obsolescence adjustment, the taxpayers had a burden to produce evidence showing that their residence suffered from an extremely abnormal circumstance.<sup>327</sup> In the instant case, the tax court found that the taxpayers provided no such evidence.<sup>328</sup> Therefore, the court held that the ISBTC correctly denied the taxpayers' request for an obsolescence adjustment.<sup>329</sup>

The court also found that the taxpayers failed to persuade the court of any inequity of assessments made under Indiana's property taxation system.<sup>330</sup> The only evidence presented by the taxpayers supporting their constitutional challenge failed, and without it "there was no specific evidence showing that the [ISBTC's] regulations, as applied, violated [the taxpayers'] rights to a uniform and equal assessment under the Indiana Constitution."<sup>331</sup> Therefore, the tax court found that the ISBTC did not abuse its discretion with respect to the taxpayers' final claim.<sup>332</sup>

7. *Alcoils, Inc. v. State Board of Tax Commissioners*.<sup>333</sup>—*Alcoils, Inc.* (taxpayer), the owner of property located in Whitley County, Indiana, sought review of three ISBTC Form 133 petitions that were allegedly filed by the taxpayer but never received by the ISBTC.<sup>334</sup> In addition, the taxpayer appealed a final determination of the ISBTC with respect to adjustments for grade and obsolescence depreciation.<sup>335</sup> The tax court affirmed the ISBTC with respect to the Form 133 petitions and affirmed in part and reversed in part the ISBTC's

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324. See *id.* at 1137.

325. See *id.* at 1134-45; see also IND. CONST. art. X, § 1 ("The General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation . . .").

326. *Id.* at 1137 (citation omitted).

327. See *id.*

328. See *id.*

329. See *id.* at 1138.

330. See *id.*

331. *Id.*

332. See *id.*

333. 727 N.E.2d 795 (Ind. Tax Ct. 2000).

334. See *id.* at 796.

335. See *id.* at 797.



final determination concerning the grade and obsolescence adjustments.<sup>336</sup> Thus, the case was remanded for further proceedings.<sup>337</sup>

First, the tax court discussed the proper filing of an ISBTC Form 133 and reviewed *Indiana Sugars, Inc. v. State Board of Tax Commissioners*.<sup>338</sup> In *Indiana Sugars*, the taxpayer filed a petition for the Enterprise Zone Business Personal Property Tax Credit<sup>339</sup> by first class mail, but the petition was never received by the Lake County Auditor.<sup>340</sup> The tax court pointed out that no statutes dealing with filing procedures of the ISBTC existed.<sup>341</sup> Finding that such statutes did exist for the IDSR, the tax court analogized between the two agencies with respect to their filing procedures.<sup>342</sup> Applying the IDSR's statutes in *Indiana Sugars*, the tax court observed that the IDSR considers a document filed if it is deposited in the United States mail before the filing deadline.<sup>343</sup> In *Alcoils*, the tax court credited the testimony of the taxpayer's representative concerning the mailing of the taxpayer's ISBTC Form 133 petitions and concluded that, based on *Indiana Sugars*, the taxpayer timely filed its ISBTC Form 133 petitions.<sup>344</sup> The court stated: "Pursuant to *Indiana Sugars*, a taxpayer merely needs to file via first class mail."<sup>345</sup> Therefore, the court found that the ISBTC Form 133 petitions in this case were properly filed.<sup>346</sup>

Next, the tax court reviewed the statutory jurisdictional prerequisites of tax court consideration of a case.<sup>347</sup> The court held that "the [ISBTC] may not cure a failure on the part of lower taxation authorities to comply with the statutory prerequisites of a valid assessment by way of its ability to correct any assessment error in taxpayer-initiated petitions."<sup>348</sup> The Indiana Supreme Court previously addressed this issue in two companion cases. In *State Board of Tax Commissioners v. Mixmill Manufacturing Co.*,<sup>349</sup> the supreme court held that when a County Board of Review fails to act upon a taxpayer's Form 131 within the statutory time frame, the tax court lacks jurisdiction to hear the case.<sup>350</sup> However, the supreme court stated that taxpayers may bring a mandamus action in a court of general jurisdiction to compel the County Board of Review to act

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336. *See id.*

337. *See id.*

338. 683 N.E.2d 1383 (Ind. Tax Ct. 1997).

339. *See* IND. CODE. § 6-1.1-20.8-1 (2000).

340. *See Indiana Sugars, Inc.*, 683 N.E.2d at 1384.

341. *See id.* at 1385.

342. *See id.* at 1385-86; *see also* IND. CODE §§ 6-8.1-6-3(a)(1), -3(b) (1998) (IDSR filing statutes).

343. *See Indiana Sugars, Inc.* at 1386 (citing IND. CODE § 6-8.1-6-3(b) (1998)).

344. *See Alcoils, Inc. v. State Bd. of Tax Comm'rs*, 727 N.E.2d 795, 798 (Ind. Tax Ct. 2000).

345. *Id.* at 798-99.

346. *See id.* at 799.

347. *See id.*

348. *Id.*

349. 702 N.E.2d 701 (Ind. 1998).

350. *See id.* at 705.



on its petition.<sup>351</sup> The Indiana Supreme Court reached the same conclusion with respect to ISBTC Form 133 in *State Board of Tax Commissioners v. L.H. Carbide Corp.*<sup>352</sup> With facts similar to those in *Alcoils*, the supreme court held that when a County Board of Review fails to act on an ISBTC Form 133, the tax court does not have jurisdiction to hear the case.<sup>353</sup> As in *Mixmill*, the supreme court stated that a taxpayer may bring a mandamus action in a court of general jurisdiction against the county officials to compel action on the petitions.<sup>354</sup>

Based on the above-discussed holdings of the supreme court, the tax court in *Alcoils* concluded that although the taxpayer in this case timely filed its ISBTC Forms 131, the ISBTC did not have the requisite jurisdiction to hear the case because the County Board of Review had not acted upon the taxpayer's ISBTC Forms 133.<sup>355</sup> Consequently, the tax court dismissed the taxpayer's ISBTC Form 133 case due to lack of jurisdiction.<sup>356</sup>

The tax court then addressed whether the ISBTC erred when it denied the taxpayer certain adjustments for the grade assigned to its real property. Buildings are graded according to the quality of their workmanship, materials, and design, and a "C" grade is given to a "moderately attractive building that conforms with the base specifications used to develop the pricing schedule."<sup>357</sup> By contrast, a grade of "B" is given to "an architecturally attractive building with good quality materials and workmanship throughout."<sup>358</sup> In this case, the ISBTC raised the grade of the taxpayer's building from a "C" to a "B" because the taxpayer used above-average materials in the building.<sup>359</sup> The tax court noted that "slight additions to the basic kit model can be accounted for by simply raising the grade . . . because none of the variations affects the actual structure of the building itself."<sup>360</sup> However, the court advised that "[a] kit building can . . . lose its status as such if it displays such extant characteristics that the structure could no longer be considered economical."<sup>361</sup>

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351. See *id.*

352. 702 N.E.2d 706 (Ind. 1998).

353. See *id.* at 707.

354. See *id.* In *Alcoils* the tax court noted:

These cases are not to be confused with [Indiana Code section] 6-1.1-15-4(e)(1), which states that a failure by the [ISBTC], not the [Board of Review], to act upon the determination within 180 days shall be treated as a final determination. In these cases, this Court possesses jurisdiction, since the statute treats the [ISBTC]'s inaction as a final assessment determination.

*Alcoils, Inc. v. State Bd. of Tax Comm'rs*, 727 N.E.2d 795, 799, n.6 (Ind. Tax Ct. 2000).

355. See *Alcoils, Inc.*, 727 N.E.2d at 799.

356. See *id.*

357. *Id.* at 800. See also IND. ADMIN. CODE tit. 50, r. 2.2-10-3(a)(3) (1996).

358. *Alcoils, Inc.*, 727 N.E.2d at 800. See also IND. ADMIN. CODE, tit. 50, r. 2.2-10-3(a)(3) (1996).

359. See *Alcoils, Inc.*, 727 N.E.2d at 800.

360. *Id.*

361. *Id.*



After considering the proffered evidence, the tax court found that the taxpayer's evidence was insufficient to overcome the ISBTC's final determination on the issue.<sup>362</sup> The court stated:

Where a taxpayer alleges that its building qualifies for the kit adjustment, the allegation itself . . . puts the grade assigned to the building at issue. Consequently, it would be nonsensical to refuse to allow the [ISBTC] to adjust the grade of the buildings if the kit adjustment is deemed to be warranted."<sup>363</sup>

The tax court concluded that the ISBTC awarded the kit adjustment and raised the grade to compensate for modifications.<sup>364</sup> The tax court found that the taxpayer was required to present probative evidence in support of this contention, but failed to do so.<sup>365</sup> Thus, the tax court upheld the ISBTC's final determination on the issue of grade.<sup>366</sup>

Next, the tax court addressed whether the ISBTC erred when it denied the taxpayer an obsolescence factor comparable to the obsolescence factor allowed for an allegedly similar property.<sup>367</sup> The court considered the taxpayer's claims and indicated that "bare allegations" do not constitute the *prima facie* case needed to trigger the ISBTC's duty to refute the taxpayer's evidence.<sup>368</sup> The court stated that "[a] taxpayer who does not present evidence of similar properties assessed differently cannot complain to this Court that the State Board failed to consider similar properties."<sup>369</sup> Therefore, the court concluded that the taxpayer failed to establish a *prima facie* case concerning its relationship to the allegedly similar property.<sup>370</sup>

Finally, the tax court considered whether the ISBTC correctly denied the taxpayer's request for a ten percent obsolescence depreciation adjustment after the taxpayer identified forms of alleged functional obsolescence in its building.<sup>371</sup> The ISBTC did not grant any obsolescence to the subject property.<sup>372</sup> However, the tax court found that since the taxpayer identified the forms of functional obsolescence its building suffered, it was entitled to a remand on the issue.<sup>373</sup> The court instructed that, upon remand, the taxpayer would be required to

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362. *See id.*

363. *Id.* at 801-01 (quoting *Barth, Inc. v. State Bd. of Tax Comm'rs*, 699 N.E.2d 800, 807 (Ind. Tax Ct. 1998)).

364. *See id.* at 801.

365. *See id.*

366. *See id.*

367. *See id.*

368. *Id.* at 801.

369. *Id.* (quoting *North Park Cinemas, Inc. v. State Bd. of Tax Comm'rs*, 689 N.E.2d 765, 771-72 (Ind. Tax Ct. 1997)).

370. *See id.*

371. *See id.*

372. *See id.*

373. *See id.* at 802.



“identify, quantify, and support its determination of functional obsolescence with probative evidence.”<sup>374</sup> The ISBTC would then be required to deal with the taxpayer’s evidence in “a meaningful manner.”<sup>375</sup>

8. *WRC Co. v. State Board of Tax Commissioners*.<sup>376</sup>—WRC Co. (taxpayer), the owner of real property located in Perry County, Indiana, asked the tax court to review a final assessment determination made by the ISBTC.<sup>377</sup> The tax court ruled against the taxpayer and affirmed the final assessment determination of the ISBTC.<sup>378</sup>

First, the tax court considered whether the ISBTC applied the correct influence factor to land owned by the taxpayer.<sup>379</sup> “Land values in a given neighborhood are determined through the application of a Land Order.”<sup>380</sup> Land orders are developed by collecting and analyzing comparable sales data for a neighborhood.<sup>381</sup> An entity known as the County Land Valuation Commission studies the sales data for the neighborhood and subsequently recommends a range of values for properties there.<sup>382</sup> ISBTC then sets the final values in a “land order.”<sup>383</sup>

The tax court explained that “[i]nfluence factors may be used by both the assessor and the [ISBTC] to adjust the values for properties that possess certain features that make those properties unique.”<sup>384</sup> It further found that the assessor must identify deviations from the norm in the subject property to apply an influence factor.<sup>385</sup> “These deviations are expressed as a percentage that reflects the composite effect of the factor or factors that influence the value.”<sup>386</sup> The court also noted that in original tax appeals, each assessment and each tax year stands alone.<sup>387</sup> Moreover, the court found that because the taxpayer’s land received a particular negative influence factor in one year does not necessarily indicate the appropriate influence factor for a subsequent reassessment.<sup>388</sup> The

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374. *Id.*

375. *Id.*

376. 729 N.E.2d 1067 (Ind. Tax Ct. 2000), available at No. 49T10-9809-TA-115, 2000 Ind. Tax LEXIS 19, at \*1 (May 23, 2000).

377. *See id.* at \*1.

378. *See id.*

379. *See id.* at \*3.

380. *Id.* *See also* IND. ADMIN. CODE tit. 50, r. 2.2-4-10(a)(9) (1996) (discussing coding for influence factors).

381. *See WRC Co.*, 2000 Ind. Tax LEXIS 19, at \*3; *see also* IND. CODE § 6-1.1-4-13.6 (1998); IND. ADMIN. CODE, tit. 50, r. 2.2-4-10 (1996).

382. *See WRC Co.*, 2000 Ind. Tax LEXIS 19, at \*3-\*4; *see also* IND. CODE § 6-1.1-4-13.6 (1998).

383. *WRC Co.*, 2000 Ind. Tax LEXIS 19, at \*4; *see also* IND. CODE § 6-1.1-4-13.6 (1998).

384. *WRC Co.*, 2000 Ind. Tax LEXIS 19, at \*4.

385. *See id.*

386. *Id.* (citing IND. ADMIN. CODE, tit. 50, r. 2.1-2-1).

387. *See id.* at \*6.

388. *See id.*



tax court reasoned that since the taxpayer failed to establish a *prima facie* case, the ISBTC had no duty to rebut the taxpayer's claim.<sup>389</sup> Consequently, the tax court affirmed the findings of the ISBTC on this issue.<sup>390</sup>

Next, the court considered "whether the [ISBTC] erred when it did not classify the taxpayer's building as a kit building."<sup>391</sup> The ISBTC distributes an instructional bulletin which discusses various aspects of kit buildings.<sup>392</sup> One feature is that "[k]it buildings are generally lightweight and are made of inexpensive materials."<sup>393</sup> The court emphasized that the instructional bulletin provides: "[I]f the additional features of the kit building result in the building no longer being economical, it cannot qualify for the kit adjustment,"<sup>394</sup> and reiterated that the ISBTC instructional bulletin "directs the inquiry to a quantification of how much a deviation from the basic kit model increases the cost of the improvement being assessed."<sup>395</sup> The tax court referred to *Morris v. State Board of Tax Commissioners*,<sup>396</sup> where the court reversed the ISBTC's final determination that a building failed to qualify as a kit building because it possessed a brick wall.<sup>397</sup> In *Morris*, the court stated that the existence of brick walls does not automatically disqualify a building from kit building status.<sup>398</sup> However, unlike the structure in *Morris*, the taxpayer's building in *WRC* was covered entirely with brick veneer.<sup>399</sup> The tax court held that although the taxpayer's building possessed most of the characteristics found in kit buildings, the fact that the building was entirely covered with brick veneer removed it from the economical category in which kit buildings were found.<sup>400</sup> Therefore, the court held in favor of the ISBTC on this issue.<sup>401</sup>

9. *Sterling Management-Orchard Ridge Apartments v. State Board of Tax Commissioners*.<sup>402</sup>—In *Sterling Management*, the owner of an apartment complex located in Kosciusko County, Indiana, appealed the ISBTC's final determination denying its request to lower the assessed value of its property.<sup>403</sup>

First, the tax court considered whether the ISBTC improperly assessed a retaining wall on the taxpayer's property. To prove that the ISBTC's assessment of the retaining wall was improper, the court required the taxpayer to

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389. See *id.* at \*7.

390. See *id.*

391. *Id.* at \*1.

392. See *id.* at \*7; see also Instructional Bulletin 91-8 (1991).

393. *WRC Co.*, 2000 Ind. Tax LEXIS 19, at \*7.

394. *Id.* at \*8 (citing Instructional Bulletin 91-8, at 7).

395. *Id.*

396. 712 N.E.2d 1120 (Ind. Tax Ct. 1999).

397. See *id.* at 1123.

398. See *id.* at 1124.

399. See *WRC Co.*, 2000 Ind. Tax LEXIS 19, at \*9.

400. See *id.* at \*10.

401. See *id.*

402. 730 N.E.2d 828 (Ind. Tax Ct. 2000)

403. See *id.* at 832.



submit evidence of probative value to the [ISBTC] showing that the retaining wall in question was not present, was present but added no value as an improvement over and above the curing contribution considered in the site valuation or was present and had a value different from its assessed value.<sup>404</sup>

The court reviewed the evidence presented at trial and determined that the evidence failed to prove the absence of a retaining wall.<sup>405</sup> Assuming the retaining wall was present, the court felt that the testimony did not constitute probative evidence as to what value should have been assigned to the wall.<sup>406</sup> The court further held that statements offered by the taxpayer did not constitute probative evidence regarding either the existence or value of the retaining wall.<sup>407</sup> Therefore, the tax court concluded that the ISBTC's duty to support its final determination with substantial evidence was not triggered, and the taxpayer's argument did not demonstrate that the ISBTC's final determination was arbitrary and capricious.<sup>408</sup> Consequently, the tax court affirmed the final determination of the ISBTC concerning the assessment of the retaining wall.<sup>409</sup>

Next, the tax court considered whether the ISBTC's valuation of iron fencing on the taxpayer's property, where the ISBTC's assessment regulations did not assign values to such fencing. The court observed that "[u]nder Indiana's ascertainable standards rule, all administrative decisions must be in accord with previously stated, ascertainable standards."<sup>410</sup> The ascertainable standards rule ensures that administrative decisions are "fair, orderly and consistent rather than irrational and arbitrary."<sup>411</sup> Under the ascertainable standards rule, the relevant standards "must be written with sufficient precision to give fair warning as to what factors an agency will consider in making an administrative decision. Moreover, standards should also be readily available to those who have potential contact with the administrative body."<sup>412</sup>

The tax court concluded that the ISBTC violated the ascertainable standards rule in this case because the ISBTC's assessment regulations failed to provide standards with respect to the valuation of iron fencing, and there was no previously announced standard for the ISBTC to apply when assessing the iron fencing.<sup>413</sup> Additionally, the tax court found that the taxpayer lacked any

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404. *Id.* at 834.

405. *See id.*

406. *See id.*

407. *See id.* at 834-35.

408. *See id.*

409. *See id.*

410. *Id.* at 836 (quoting *Boaz v. Bartholomew Consol. Sch. Corp.*, 654 N.E.2d 320, 323 (Ind. Tax Ct. 1995)).

411. *Id.* at 836-37 (quoting *Garcia v. State Bd. of Tax Commr's*, 694 N.E.2d 794, 796 (Ind. Tax Ct. 1998) (citation omitted)).

412. *Id.* at 837.

413. *See id.*



warning that the ISBTC would rely upon market information to assess the fencing.<sup>414</sup> The court also emphasized that the ISBTC's standards were not readily available to the taxpayer.<sup>415</sup> Accordingly, the tax court found that the ISBTC's assessment of the taxpayer's iron fencing was arbitrary and capricious, reversed the ISBTC's final determination on the issue of the valuation of the iron fencing, and remanded to the ISBTC.<sup>416</sup> The court instructed the ISBTC "to conduct a hearing on this issue, during which it shall accept and consider any objectively verifiable evidence submitted by [the taxpayer] as to the iron fencing's value."<sup>417</sup>

The final issue that the tax court considered in *Sterling* was whether the ISBTC assigned the correct grade to the taxpayer's apartment complex.<sup>418</sup> The tax court concluded that because the taxpayer failed to identify any probative evidence of record indicating what the correct grade should be, it need not address whether or not the ISBTC's decision was supported by substantial evidence.<sup>419</sup> The court found that the taxpayer's submissions both to the ISBTC and to the court did not constitute probative evidence.<sup>420</sup> In addition, the court found that "questions as to definitions do not constitute probative evidence on the issue of grade" and that "the taxpayer should offer specific evidence tied to the various descriptions of grade classifications."<sup>421</sup> In the absence of the taxpayer presenting probative evidence as to grade, the ISBTC was not required to support its final determination on the issue with substantial evidence.<sup>422</sup> Therefore, the tax court affirmed the ISBTC's final determination on the issue of grade.<sup>423</sup>

10. *Plainfield Elks Lodge No. 2186 v. State Board of Tax Commissioners.*<sup>424</sup>—In *Plainfield Elks Lodge No. 2186*, the owner of property consisting of a golf course, swimming pool, and lodge house located in Hendricks County, Indiana, appealed the final assessment determination of the ISBTC denying the owner a property tax exemption.<sup>425</sup> In this tax appeal, the Plainfield Elks Lodge No. 2186 (taxpayer) raised only the issue of whether the taxpayer's property met the "charitable purpose" requirements of sections of 6-1.1-10-16(a) to -36.3(a) of the Indiana Code.<sup>426</sup> The court defined the pivotal

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414. *See id.*

415. *See id.*

416. *See id.* at 838.

417. *Id.*

418. *See id.* at 832.

419. *See id.* at 838.

420. *See id.* at 839.

421. *Id.* at 839-40.

422. *See id.* at 840.

423. *See id.*

424. 733 N.E.2d 32 (Ind. Tax Ct. 2000).

425. *See id.* at 33.

426. *See id.* In its discussion of the case, the court found that the requirements of the relevant provisions of the Indiana Code are strictly construed against the taxpayer, as are other tax exemption statutes. However, the court cautioned that such provisions should not be construed so



inquiry in the case as whether the use of the property furthered exempt purposes.<sup>427</sup>

Section 6-1.1-10-16(a) of the Indiana Code stated that "a building is exempt from property tax if it is owned, occupied and used by a person for educational, literary, scientific, religious or charitable purposes."<sup>428</sup> Section 6-1.1-10-36.3(a) further states that "a property is predominately used during the year for one or more of the above purposes if it is used or occupied more than [fifty percent] of the time."<sup>429</sup> The tax court found that if this test is met, the property is entitled to an exemption proportional to the amount of time it was used for the exempt purposes.<sup>430</sup> Therefore, in order to receive the exemption, the taxpayer had to prove that its property was predominately used for charitable purposes.<sup>431</sup>

The tax court explained that in analyzing the test, the term charity would be defined in its broad constitutional sense, as is applied to the use of any property alleged to be exempt from property taxation.<sup>432</sup> The court also acknowledged that the Indiana Supreme Court has analyzed an organization's time and monetary contributions together when deciding whether or not to grant a property tax exemption.<sup>433</sup> In addition, the court referred to *Foursquare Tabernacle Church of God in Christ v. State Board of Tax Commissioners*,<sup>434</sup> where it determined that "the rationale behind the exemption is that a present benefit to the general public exists from the operation of the charitable institution sufficient to justify the loss of tax revenue."<sup>435</sup> The tax court also observed that the supreme court has ruled that an organization may make a small profit, yet still retain its exempt status.<sup>436</sup>

In this case, the tax court found that when combined with the taxpayer's monetary donations, the property was predominately - but not solely - used for charitable purposes.<sup>437</sup> Therefore, the tax court concluded that the taxpayer was entitled to an exemption and that the ISBTC abused its discretion by failing to grant the taxpayer a property tax exemption.<sup>438</sup> The court reversed the final

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narrowly as to defeat or frustrate the legislature's purpose. *See id.* at 34.

427. *See id.* at 34.

428. *Id.*

429. *Id.*

430. *See id.*; *see also* IND. CODE § 6-1.1-10-36.3(b)(3).

431. *See Plainfield Elks Lodge No. 2186*, 733 N.E.2d at 34; *see also* IND. CODE §§ 6-1.1-10-16(a), 6-1.1-36.3(a).

432. *See Plainfield Elks Lodge No. 2186*, 733 N.E.2d at 34.

433. *See id.* at 35 (citing *State Bd. of Tax Comm'rs v. Fraternal Order of Eagles, Lodge No. 255*, 521 N.E.2d 678, 681 (Ind. 1988)).

434. 550 N.E.2d 850, 854 (Ind. Tax Ct. 1990).

435. *Plainfield Elks Lodge No. 2186*, 733 N.E.2d at 35.

436. *See id.* at 35-36; *see also* *State Bd. of Tax Comm'rs v. Indianapolis Lodge No. 17, Loyal Order of Moose, Inc.*, 200 N.E.2d 221, 225 (Ind. 1964) (holding taxpayer entitled to exemption, despite small profit made from dining room).

437. *See Plainfield Elks Lodge No. 2186*, 733 N.E.2d at 36.

438. *See id.*



determination of the ISBTC, which denied the taxpayer a property tax exemption, and remanded the case with instructions to determine the appropriate exemption.<sup>439</sup>

11. *New Castle Lodge No. 147, Loyal Order of Moose, Inc. v. State Board of Tax Commissioners*.<sup>440</sup>—In *New Castle Lodge No. 147*, a fraternal organization that owned a lodge building located in Henry County, Indiana, appealed the final determination of the ISBTC denying it a property tax exemption.<sup>441</sup> Specifically, *New Castle Lodge No. 147, Loyal Order of Moose, Inc.* (taxpayer) requested a determination of whether or not the taxpayer's property was predominately used for charitable purposes under sections 6-1.1-10-16(a) and 6-1.1-10-36.3(a) of the Indiana Code.<sup>442</sup> Therefore, the tax court indicated that the pivotal question in this case was whether or not the use of the property furthered exempt purposes.<sup>443</sup>

The tax court noted that in *Plainfield Elks Lodge No. 2186*,<sup>444</sup> it held that the taxpayer was entitled to a partial exemption, while in *Alte Salems Kirche*,<sup>445</sup> it held that the taxpayer was entitled to a 100% exemption.<sup>446</sup> The tax court noted that as stated in both the statute and in *Plainfield Elks Lodge No. 2186*, entitlement to an exemption depends upon whether the property is being used for charitable purposes more than fifty percent of the time.<sup>447</sup> The tax court observed that if this test was met, the property was entitled to an exemption in proportion to the amount of time it was used for charitable purposes.<sup>448</sup> The tax court noted that in *Plainfield Elks Lodge No. 2186*, it found that the combination of the Elks' monetary and in-kind donations to the local community were enough to qualify it for a partial exemption.<sup>449</sup>

In its review of the case, the tax court considered *Indianapolis Elks Building Corp. v. State Board of Tax Commissioners*,<sup>450</sup> where the court of appeals held

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439. See *id.*

440. 733 N.E.2d 36 (Ind. Tax Ct.), vacated by 741 N.E.2d 1260 (Ind. 2000).

441. See *id.* at 38.

442. See *id.* The tax court found that like other tax exemption statutes, the requirements of section 6-1.1-10-36.3(a) of the Indiana Code are strictly construed against the taxpayer. However, the tax court cautioned that this statutory provision is not to be construed so narrowly that the legislature's purpose in enacting it is defeated or frustrated.

443. See *id.* at 38-39.

444. 733 N.E.2d at 32.

445. *Alte Salems Kirche, Inc. v. State Bd. of Tax Comm'rs*, 733 N.E.2d 40, 44 (Ind. Tax Ct. 2000).

446. See *New Castle Lodge No. 147, Loyal Order of Moose, Inc.*, 733 N.E.2d at 39.

447. See *id.*; see also IND. CODE § 6-1.1-10-36.3(a); *Plainfield Elks Lodge No. 2186*, 733 N.E.2d at 34.

448. See *New Castle Lodge No. 147, Loyal Order of Moose, Inc.*, 733 N.E.2d at 39; see also IND. CODE § 6-1.1-10-36.3(b)(3).

449. See *New Castle Lodge No. 147, Loyal Order of Moose, Inc.*, 733 N.E.2d at 39; see also *Plainfield Elks Lodge No. 2186*, 733 N.E.2d at 36.

450. 251 N.E.2d 673, 683 (Ind. Ct. App. 1969).



that the taxpayer did not qualify for the exemption when only three percent of its gross income was donated to charity.<sup>451</sup> The tax court also considered *State Board of Tax Commissioners v. Fraternal Order of Eagles, Lodge No. 255*,<sup>452</sup> where the supreme court held that a taxpayer's contributions were not enough to entitle it to an exemption.<sup>453</sup> The tax court opined that the determination of an organization's exempt status does not turn on the percentage of its gross income used for charitable, educational or other benevolent purposes.<sup>454</sup> Instead, a building's exempt status actually turns on whether or not the property was predominately used for the above-mentioned purposes more than fifty percent of the time.<sup>455</sup> The tax court also observed that the statute contemplated that a charitable organization's property could be used for some social purposes and still receive the exemption.<sup>456</sup> The tax court found that the taxpayer in this case used its property predominately, though not solely, for charitable purposes.<sup>457</sup> Consequently, the tax court held that the ISBTC abused its discretion by failing to grant the taxpayer an exemption.<sup>458</sup> Therefore, the tax court reversed the final determination of the ISBTC and remanded the case to the ISBTC with instructions to determine the appropriate exemption allowed by section 6-1.1-10-36.3(b)(3) of the Indiana Code.<sup>459</sup>

12. *Alte Salems Kirche, Inc. v. State Board of Tax Commissioners*.<sup>460</sup>—In *Alte Salems Kirche*, the owner of property consisting of a church building, a mobile home, and a barn located in Posey County, Indiana, appealed the final assessment determination of the ISBTC denying it a property tax exemption.<sup>461</sup> *Alte Salems Kirche, Inc.* (taxpayer) raised the issue of whether the taxpayer met the "charitable purpose" requirements of sections 6-1.1-10-16(a) and 6-1.1-10-36.3(a) of the Indiana Code.<sup>462</sup> The tax court found that the taxpayer met the statutory requirements and was therefore entitled to an exemption.<sup>463</sup>

The court indicated that the church was officially non-denominational, and

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451. See *New Castle Lodge No. 147, Loyal Order of Moose, Inc.*, 733 N.E.2d at 39.

452. 521 N.E.2d 678, 681 (Ind. 1988).

453. See *New Castle Lodge No. 147, Loyal Order of Moose, Inc.*, 733 N.E.2d at 39.

454. See *id.*

455. See *id.*; see also IND. CODE § 6-1.1-10-36.3(a).

456. See *New Castle Lodge No. 147, Loyal Order of Moose, Inc.*, 733 N.E.2d at 40; see also IND. CODE § 6-1.1-10-36.3(a).

457. See *New Castle Lodge No. 147, Loyal Order of Moose, Inc.*, 733 N.E.2d at 40.

458. See *id.*

459. See *id.*

460. 733 N.E.2d 40 (Ind. Tax Ct. 2000).

461. See *id.* at 42.

462. See *id.* As in *Plainfield Elks Lodge No. 2186*, the tax court indicated that the requirements of section 6-1.1-10-36.3(a) are strictly construed against the taxpayer and again cautioned that the provision was not to be construed so narrowly that the legislature's purpose in enacting it is defeated or frustrated. See *id.* at 43.

463. See *id.* at 44.



that people of various faiths often worshiped there.<sup>464</sup> It further observed that for several years the ISBTC granted the taxpayer a property tax exemption.<sup>465</sup> However, in its final determination, the ISBTC denied the taxpayer a property tax exemption.<sup>466</sup>

The court indicated that the pivotal inquiry was whether the use of the property furthered exempt purposes.<sup>467</sup> Section 6-1.1-10-36.3(b)(2) of the Indiana Code states that "if property is predominately used for religious or charitable purposes by a church or religious society, then it is completely exempt from taxation."<sup>468</sup>

The ISBTC found the taxpayer's evidence of comparable properties irrelevant to the taxpayer's case and failed to consider it an abuse of discretion.<sup>469</sup> In so holding, the court looked to its previous ruling in *Foursquare Tabernacle Church of God in Christ v. State Board of Tax Commissioners*,<sup>470</sup> where it determined that "the rationale behind the charitable purpose exemption was that a present benefit to the general public exists from the operation of the charitable institution sufficient to justify the loss of tax revenue."<sup>471</sup> The tax court observed that the Alte Salem Kirche church was available twenty-four hours a day, seven days a week for prayer, meditation or other religious purposes and also considered the educational and religious uses of the property.<sup>472</sup> The court held that the taxpayer's church building was entitled to the property tax exemption.<sup>473</sup>

In addition to the church building, the taxpayer owned a mobile home and barn, which were also denied exemptions by the ISBTC. The tax court indicated that "property must be reasonably necessary for the maintenance of, and not just related to, the exempt purposes of the charitable organization."<sup>474</sup> The court determined that the use of the barn for storage and uses of the mobile home were reasonably necessary to the maintenance of the church, and thus, should have been allowed property tax exemptions as well.<sup>475</sup>

In summary, the tax court found that the taxpayer "used its property

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464. See *id.* at 42.

465. See *id.*

466. See *id.* In a prior review of the case, the tax court found that the ISBTC failed to consider all the evidence presented and remanded the case for further consideration. Following the remand, the ISBTC issued its final determination affirming the ISBTC's earlier decision to deny the exemption. See *id.*

467. See *id.* at 43.

468. *Id.*

469. See *id.*

470. 550 N.E.2d 850, 854 (Ind. Tax Ct. 1990).

471. *Alte Salems Kirche, Inc.*, 733 N.E.2d at 44 (citing *Foursquare Tabernacle Church of God in Christ*, 550 N.E.2d at 854).

472. See *id.*

473. See *id.*

474. *Id.* (citing *St. Mary's Med. Ctr. v. State Bd. of Tax Comm'rs*, 534 N.E.2d 277, 279 (Ind. Tax Ct. 1989) *aff'd*, 571 N.E.2d 1247, 1249 (Ind. 1991)).

475. See *id.*



predominately for religious, charitable and educational purposes during the relevant tax year.”<sup>476</sup> Consequently, the tax court held that in denying the taxpayer a property tax exemption the ISBTC abused its discretion.<sup>477</sup> Therefore, the tax court reversed the final determination of the ISBTC and remanded the case with instructions to grant the taxpayer a one hundred percent property tax exemption on its building, its mobile home, and its barn.<sup>478</sup>

13. *Fleet Supply, Inc. v. State Board of Tax Commissioners*.<sup>479</sup>—Fleet Supply, Inc. (taxpayer), the owner of a building located in Howard County, Indiana, appealed from a final determination of the ISBTC to apply a forty-year life expectancy table when calculating the physical depreciation allowed on a building it owned.<sup>480</sup> In this case, the tax court affirmed the ISBTC’s final determination.<sup>481</sup>

The tax court explained that “[p]hysical depreciation is determined by the combination of age and condition.”<sup>482</sup> The tax court observed that based on the construction of a structure either a twenty, thirty, forty, fifty, or a sixty-year table is used to depreciate the structure.<sup>483</sup> The tax court noted that while light pre-engineered buildings are depreciated under the thirty-year table, all fire-resistant buildings not listed elsewhere in the regulations are depreciated under the forty-year table.<sup>484</sup>

The tax court observed that the only evidence presented by the taxpayer to establish its *prima facie* case consisted of two photographs showing the exterior of its building, a closing statement that reflected the taxpayer’s subsequent sale of the building, and trial testimony from the taxpayer’s representative.<sup>485</sup> The tax court concluded that the photographs did not constitute probative evidence in this case.<sup>486</sup> Also, the tax court indicated that the taxpayer’s closing statement reflecting a subsequent sale did not assist the taxpayer’s case because Indiana does not use market value when assessing property.<sup>487</sup> Observing its familiar

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476. *Id.*

477. *See id.*

478. *See id.*

479. 740 N.E.2d 598 (Ind. Tax Ct. 2000).

480. *See id.* at 599.

481. *See id.*

482. *Id.* at 600 (citing IND. ADMIN. CODE tit. 50, r. 2.1-5-1 (1992) (codified in present form at *id.*, r. 2.2-10-7 (1996))).

483. *See id.* (citing IND. ADMIN. CODE tit. 50, r. 2.1-5-1 (1992) (codified in present form at *id.*, r. 2.2-10-7 (2001))).

484. *See id.*

485. *See id.*

486. *See id.*

487. *See id.* at 600-01; *see also* *Kemp v. State Bd. of Tax Comm’rs*, 726 N.E.2d 395, 403 (Ind. Tax Ct. 2000) (holding Indiana does not value property based on its market value, rather the assessed value of property is based on its reproduction cost as determined by the ISBTC’s regulations).



maxim that each tax year stands alone, the tax court also held that the taxpayer's evidence was faulty because it dealt with a tax year not in question.<sup>488</sup> The tax court indicated that in the absence of substantiating information, the testimony proffered by the taxpayer amounted to mere allegations that did not support the taxpayer's case.<sup>489</sup> Accordingly, the tax court found that the taxpayer failed to establish a prima facie case concerning the alleged invalidity of the taxpayer's assessment and that the ISBTC was not required to rebut any of the taxpayer's evidence.<sup>490</sup> As a result, the tax court affirmed the final determination of the ISBTC in this case.<sup>491</sup>

14. *Quality Stores, Inc. v. State Board of Tax Commissioners*.<sup>492</sup>—Quality Stores, Inc. (taxpayer), the owner of a building located in Hamilton County, Indiana, appealed the final determination of the ISBTC to apply a forty-year life expectancy table when calculating the physical depreciation allowed on a building it owned.<sup>493</sup> In this case, the tax court affirmed the ISBTC's final determination.<sup>494</sup>

The tax court observed that the only evidence presented by the taxpayer to make its prima facie case consisted of an appraisal study (study) that among other things contained photographs showing the exterior and interior of the taxpayer's building.<sup>495</sup> The tax court reviewed the other contents of the study and noted that generally accepted appraisal techniques may be used to help determine physical depreciation in the absence of guidance from the regulations, but when the regulations are clear, as they were in this case, the regulations govern.<sup>496</sup> Also, the tax court rejected the study because it dealt with figures that were not relevant to the tax year at issue in this case.<sup>497</sup> The tax court concluded that neither the study nor the submitted photographs constituted probative evidence in this case.<sup>498</sup> The tax court also held that the testimony proffered by the taxpayer did not help its case because it amounted to nothing more than bare allegations that did not constitute probative evidence.<sup>499</sup> Therefore, the tax court found that the taxpayer failed to establish a prima facie case concerning its assessment and that the ISBTC was not required to rebut any of the taxpayer's evidence.<sup>500</sup> As a result, the tax court affirmed the ISBTC's final

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488. See *Fleet Supply, Inc.*, 740 N.E.2d at 601.

489. See *id.*

490. See *id.*

491. See *id.*

492. 740 N.E.2d 939 (Ind. Tax Ct. 2000).

493. See *id.* at 940.

494. See *id.*

495. See *id.* at 942.

496. See *id.*

497. See *id.*

498. See *id.*

499. See *id.* at 943.

500. See *id.*



determination.<sup>501</sup>

*B. Indiana Property Taxes—Tangible Personal Property Taxes*

1. *Graybar Electric Co. v. State Board of Tax Commissioners*.<sup>502</sup>—Graybar Electric Co. (taxpayer), an electric company with an office located in Lake County, Indiana, appealed from a final determination of the ISBTC, in which it denied the taxpayer's claim for the Enterprise Zone Business Personal Property Tax Credit<sup>503</sup> (EZ Credit) based on the untimeliness of the taxpayer's application.<sup>504</sup> Specifically, the taxpayer requested a determination of whether the ISBTC possessed the authority to consider the taxpayer's application for the EZ Credit when it was not filed timely. In this case, the tax court reversed the ISBTC's final determination.<sup>505</sup>

As background, the tax court explained that Lake County allows a property tax credit for "enterprise zone inventory," which is inventory located within an enterprise zone on the assessment date.<sup>506</sup> The tax court noted that the purpose of the credit is to encourage capital investment in the enterprise zone area in order to create jobs.<sup>507</sup> The tax court found that in order to obtain the credit, the taxpayer was required to apply to both the Lake County Auditor and the ISBTC.<sup>508</sup> The tax court noted the additional requirement that the taxpayer should file its application within the time period required by section 6-1.1-20.8-2 of the Indiana Code.<sup>509</sup>

The tax court considered whether *State Board of Tax Commissioners v. New Energy Co. of Indiana*,<sup>510</sup> should control the outcome of this case.<sup>511</sup> The tax

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501. See *id.*

502. 723 N.E.2d 491 (Ind. Tax Ct. 2000).

503. See IND. CODE § 6-1.1-20.8-1 (2000).

504. See *Graybar Electric Co.*, 723 N.E.2d at 491.

505. See *id.*

506. *Id.*

507. See *id.*

508. See *id.*; see also IND. CODE § 6-1.1-20.8-2 (2000).

509. See *Graybar Electric Co.*, 723 N.E.2d at 491; see also IND. CODE § 6-1.1-20.8-2 (2000).

(A person that timely files a personal property return under Indiana Code section 6-1.1-3-7(a) for an assessment year must file the application between March 1 and May 15 of that year in order to obtain the credit in the following year. A person that obtains a filing extension under Indiana Code section 6-1.1-3-7(b) for an assessment year must file the application between March 1 and June 14 of that year in order to obtain the credit in the following year.)

510. 585 N.E.2d 38 (Ind. Ct. App. 1992).

511. See *Graybar Electric Co.*, 723 N.E.2d at 494. In *New Energy*, the ISBTC relied on section 6-1.1-12.1-5.5(a) of the Indiana Code when it denied an application for a deduction from assessed valuation for new manufacturing equipment in economic revitalization area based on the untimely filing of the application. The trial court ruled that despite the language of the statute, the ISBTC had the authority to hear a late-filed application and remanded the case to the ISBTC for further consideration, and the court of appeals affirmed. The tax court noted that while opinions



court found that in *Graybar*, the ISBTC presented a similar argument to the one asserted in *New Energy*—that section 6-1.1-20.8-2 of the Indiana Code operates as an implied waiver if a credit application is filed late.<sup>512</sup> The tax court reasoned that while a deduction is allowed in one instance and a credit in another, both concepts serve to reduce a taxpayer's tax liability.<sup>513</sup> Therefore, the tax court determined that the *New Energy* holding applied to *Graybar*.<sup>514</sup>

The tax court then considered whether or not the language contained in section 6-1.1-20.8-2 of the Indiana Code created a condition precedent.<sup>515</sup> The tax court compared the language of section 6-1.1-20.8-2 of the Indiana Code with the language in section 6-1.1-12.1-5.5 of the Indiana Code and rejected the ISBTC's assertion that the statutory language creates a condition precedent.<sup>516</sup>

Even though the taxpayer's EZ Credit application was filed late, the tax court determined that the ISBTC had the authority to consider the application and that the ISBTC should not have dismissed the application for lack of jurisdiction.<sup>517</sup> However, the tax court did not render a decision on the merits of the taxpayer's application.<sup>518</sup> The tax court instructed that, on remand, the ISBTC was to consider the merits of the taxpayer's application and noted that while the ISBTC was required to consider the taxpayer's application, the tax court's decision did not necessarily require that the ISBTC grant it.<sup>519</sup> In summary, the tax court reversed the final determination of the ISBTC, denying the taxpayer an EZ Credit based on the taxpayer's untimely filing of the EZ Credit application, and remanded the case to the ISBTC.<sup>520</sup>

2. *W.H. Paige & Co. v. State Board of Tax Commissioners*.<sup>521</sup>—*W.H. Paige & Co.* (taxpayer), engaged in the business of selling and leasing musical instruments, challenged the final determination of the ISBTC that assessed the taxpayer a twenty percent undervaluation penalty for failing to file the required personal property tax returns on musical instruments it leased to its customers.<sup>522</sup> The sole issue presented for the tax court's consideration in this case was whether "interpretive differences" existed between the taxpayer and the ISBTC regarding the applicability of personal property tax that precluded the imposition

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and decisions of the court of appeals are not binding authority in the tax court, they can be considered as persuasive authority. See *New Energy Co.*, 585 N.E.2d at 40.

512. See *Graybar Electric Co.*, 723 N.E.2d at 494.

513. See *id.* at 495.

514. See *id.*; see also *New Energy Co.*, 585 N.E.2d at 40.

515. See *Graybar Electric Co.*, 723 N.E.2d at 494. The court explained that a condition precedent is either a condition that must be performed before an obligation becomes binding or a condition that must be fulfilled before the duty to perform an existing obligation arises.

516. See *id.*

517. See *id.* at 496.

518. See *id.*

519. See *id.*

520. See *id.*

521. 732 N.E.2d 269 (Ind. Tax Ct. 2000).

522. See *id.*



of the undervaluation penalty.<sup>523</sup> In this case, the tax court affirmed the final determination of the ISBTC.<sup>524</sup>

The tax court explained that the Indiana tangible personal property tax system is a self-assessment system and is, therefore, relies heavily on full disclosure and accurate reporting.<sup>525</sup> The tax court also reviewed the language of section 6-1.1-37-7(e) of the Indiana Code, which specifically provides for the assessment of a twenty percent undervaluation penalty.<sup>526</sup> The tax court found that the purpose of the undervaluation penalty is to ensure a complete disclosure of all information required by the state board on the prescribed self-assessment personal property form.<sup>527</sup> The tax court also found that complete disclosure enables the township assessor, county board of review, and the ISBTC to carry out their statutory duties of examining returns each year to determine if they substantially comply with the rules of the ISBTC.<sup>528</sup> On the other hand, the tax court noted that this statutory provision was not intended to impose a penalty on a person who makes a complete disclosure of the information required on the assessment return form.<sup>529</sup> The tax court recognized that an exception to the mandatory penalty exists only if the taxpayer has complied with all of the requirements for claiming a deduction, an exemption, or an adjustment for abnormal obsolescence or permanently retired equipment.<sup>530</sup> The tax court found that if such deduction, exemption, or adjustment is denied, the "increase in assessed value that results from [the] denial of the deduction, exemption or adjustment" is not considered to be an undervaluation, rather it is considered to be an "interpretive difference" not subject to the penalty.<sup>531</sup> However, the tax court held that all other amounts "not fully disclosed through omission or undervaluation . . . are subject to the twenty percent penalty."<sup>532</sup> The court further explained that the term "interpretive difference," as defined in the regulations, does not mean any disagreement or misunderstanding between the taxpayer and the ISBTC.<sup>533</sup> Instead, the tax court found that the regulations limit

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523. *Id.* The tax court previously reviewed the undisputed facts of this case and found that the lease agreements, which the taxpayer entered into under its monthly rent-to-own program, did not grant the taxpayer a security interest in the musical instruments. The tax court held that the taxpayer was liable for the tangible personal property tax on the musical instruments because the taxpayer remained owner of the musical instruments for purposes of imposing the tangible personal property tax and because the taxpayer's leases were terminable at will by the lessee.

524. *See id.*

525. *See id.* at 270.

526. *See id.* at 271.

527. *See id.*; *see also* IND. ADMIN. CODE tit. 50, r. 4.2-2-10(d) (2000).

528. *See W.H. Paige & Co.*, 732 N.E.2d 269.

529. *See id.*

530. *See id.*; *see also* IND. CODE § 6-1.1-37-7(e) (2000).

531. *W.H. Paige & Co.*, 732 N.E.2d at 271-72. *See also* IND. ADMIN. CODE tit. 50, r. 4.2-2-10(d) (2000).

532. *W.H. Paige & Co.*, 732 N.E.2d at 272.

533. *See id.*; *see also* IND. ADMIN. CODE tit. 50, r. 4.2-2-10(d) (2000).



the situations in which the term "interpretive difference" applies.<sup>534</sup>

The tax court observed that in *Rogers v. State Board of Tax Commissioners*,<sup>535</sup> it ruled that the ISBTC improperly imposed the undervaluation penalty on the taxpayer because the taxpayer's undervaluation resulted from "interpretive differences" concerning a personal property tax adjustment.<sup>536</sup> Moreover, the tax court stated that the "increase in assessed value resulting from the state board's denial of the adjustment is not subject to penalty."<sup>537</sup> Similarly, the tax court referred to *Monarch Steel Co. v. State Board of Tax Commissioners*,<sup>538</sup> where it held that the nature and length of the litigation concerning the applicability of the interstate commerce exemption for business personal property assessments established "interpretive differences" that precluded imposition of the penalty against the taxpayer for undervaluation of its inventory.<sup>539</sup> The tax court found that unlike the taxpayers in *Rogers* and *Monarch Steel*, the taxpayer in *W.H. Paige & Co.* did not comply with the requirements of section 6-1.1-37-7(e) of the Indiana Code and rule 4.2-2-10(c) of title 50 of the Indiana Administrative Code.<sup>540</sup>

The tax court determined that the taxpayer misunderstood the taxpayer's agreements to be sales with security interests instead of leases and consequently omitted the musical instruments that it leased from its personal property tax return resulting in an undervaluation that exceeded five percent of the value that should have been reported on the return.<sup>541</sup> The tax court indicated that this situation did not fall within the statutory exceptions to the mandatory undervaluation penalty and it was not considered to be an "interpretive difference."<sup>542</sup> Therefore, the tax court held that section 6-1.1-37-7(e) of the Indiana Code was triggered and that the twenty percent undervaluation penalty must be applied.<sup>543</sup>

### C. Indiana Gross Income Tax

1. *Uniden American Corp. v. Department of State Revenue*.<sup>544</sup>—Uniden American Corp. (taxpayer) appealed the final determination of the IDSR that partially denied the taxpayer's protest of the IDSR's proposed assessment of

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534. See *W.H. Paige & Co.*, 732 N.E.2d at 272; see also IND. ADMIN. CODE tit. 50, r. 4.2-2-10(d) (2000).

535. 565 N.E.2d 398, 400 (Ind. Tax Ct. 1991).

536. See *W.H. Paige & Co.*, 732 N.E.2d at 272; see also *Rogers*, 565 N.E.2d at 403.

537. See *W.H. Paige & Co.*, 732 N.E.2d at 272.

538. 611 N.E.2d 708, 710 (Ind. Tax Ct. 1993).

539. See *W.H. Paige & Co.*, 732 N.E.2d at 272; see also *Monarch Steel*, 611 N.E.2d at 715.

540. See *W.H. Paige & Co.*, 732 N.E.2d at 272.

541. See *id.*

542. See *id.*; see also IND. ADMIN. CODE, tit. 50, r. 4.2-2-10 (2000).

543. See *W.H. Paige & Co.*, 732 N.E.2d at 272-73.

544. 718 N.E.2d 821 (Ind. Tax Ct. 1999)



Indiana gross income tax.<sup>545</sup> The sole issue considered by the tax court was whether certain interstate sales of the taxpayer's products were subject to the Indiana gross income tax.<sup>546</sup>

The tax court observed that although the taxpayer was incorporated under the laws of Indiana and filed Indiana corporate income tax returns for the relevant taxable years, the taxpayer's commercial domicile was in Texas.<sup>547</sup> The taxpayer engaged in the interstate sale and distribution of consumer and commercial electronic products such as cellular telephones, pagers, two-way radios, cordless telephones and marine radios.

The tax court found that the taxpayer shipped the taxpayer's products from locations outside of Indiana to in-state customers (Indiana destination sales).<sup>548</sup> The tax court noted that the standard sales terms between the taxpayer and its customers with respect to the Indiana destination sales provided for delivery F.O.B. the taxpayer's warehouse, with title and risk of loss passing to the buyer upon delivery by the taxpayer to the carrier.<sup>549</sup> The tax court held that "these sales did not originate from, were not channeled through, and were not otherwise associated with or facilitated by any Indiana situs of the taxpayer."<sup>550</sup>

The tax court observed that section 6-2.1-1-2(a)(1) of the Indiana Code defines "[g]ross income" in part as "all the gross receipts a taxpayer receives . . . from trades, businesses, or commerce."<sup>551</sup> However, the tax court noted that section 6-2.1-1-2(c)(6) of the Indiana Code provides the following exclusion from the definition of gross income:

(c) [t]he term "gross income" does not include: . . . (6) gross receipts received by corporations incorporated under the laws of Indiana from a trade or business situated and regularly carried on at a legal situs outside Indiana or from activities incident to such trade or business (including the disposal of capital assets or other properties which were acquired and used in such trade or business).<sup>552</sup>

The tax court noted that as applied to a taxpayer, the term "receipts" is defined as "the gross income in cash notes, credits, or other property that was received by the taxpayer or a third party for the taxpayer's benefit."<sup>553</sup> The tax court explained that Indiana imposes a gross income tax pursuant to section 6-2.1-2-2 of the Indiana Code, upon the receipt of: (1) the entire taxable gross income of a taxpayer who is a resident or a domiciliary of Indiana; and (2) the taxable income derived from activities or businesses or any other sources within Indiana

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545. See *id.* at 822-23.

546. See *id.* at 823.

547. See *id.*

548. See *id.*

549. See *id.*

550. *Id.*

551. *Id.* at 824. See also IND. CODE § 6-2.1-1-2(a)(1).

552. *Uniden Am. Corp.*, 718 N.E.2d at 821. See also IND. CODE § 6-2.1-1-2(c)(6).

553. *Uniden Am. Corp.*, 718 N.E.2d at 821. See also IND. CODE § 6-2.1-1-10.



by a taxpayer who is not a resident or a domiciliary of Indiana.<sup>554</sup> The tax court further explained that a taxpayer's "taxable gross income" includes all gross income not exempted, less all permitted deductions.<sup>555</sup>

The taxpayer contended that the plain language of section 6-2.1-1-2(c)(6) of the Indiana Code prohibited the imposition of the gross income tax upon the Indiana destination sales.<sup>556</sup> The tax court indicated that if the language of the relevant statutory text was ambiguous, then the tax court would resolve all doubts in favor of the taxpayer.<sup>557</sup> The tax court then reviewed the statute and found that a plain and ordinary reading of section 6-2.1-1-2(c)(6) of the Indiana Code suggests that the taxpayer's income from the Indiana destination sales is not subject to the gross income tax.<sup>558</sup> The tax court opined that the crucial inquiry in its determination was whether or not the gross receipts received by the taxpayer from the Indiana destination sales were derived from a trade or business situated and regularly carried on at a legal situs outside Indiana.<sup>559</sup> The tax court determined that the taxpayer's income from the Indiana destination sales was derived from trade or business activities taking place and carried on at a legal situs beyond Indiana's borders.<sup>560</sup> The tax court found that under section 6-2.1-1-2(c)(6), nontaxable gross receipts include those from a trade or business situated and regularly carried on at a legal situs outside Indiana or from activities incident to such trade or business, and that this statute does not require that the gross receipts qualifying for the exclusion be received from sources outside Indiana.<sup>561</sup> The tax court concluded that the statutory language effectively ignored the "source" of a resident Indiana corporation's gross receipts.<sup>562</sup>

The tax court looked to *Indiana-Kentucky Electric Corp. v. Department of State Revenue*,<sup>563</sup> where the tax court interpreted the meaning of the term "sources" as the term is used in section 6-2.1-2-2(a)(2) of the Indiana Code. The tax court noted that it had explicitly established a three-part test for determining whether or not income is derived from an Indiana source (tax situs):

[T]he court must: (1) isolate the transaction giving rise to the income, the critical transaction; (2) determine whether [the out-of-state taxpayer] has a physical presence in the taxing state or has significant business activities within the taxing state, a "business situs;" and, (3) determine whether the Indiana activities are related to the critical transaction and are more than minimal, not remote or incidental to the total transaction,

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554. See *Uniden Am. Corp.*, 718 N.E.2d at 821. See also IND. CODE § 6-2.1-2-2.

555. *Uniden Am. Corp.*, 718 N.E.2d at 821. See also IND. CODE § 6-2.1-1-13.

556. See *Uniden Am. Corp.*, 718 N.E.2d at 821.

557. See *id.* at 825.

558. See *id.*

559. See *id.*

560. See *id.*

561. See *id.* at 826.

562. See *id.* at 826-27.

563. 598 N.E.2d 647, 663 (Ind. Tax Ct. 1992).



the "tax situs."<sup>564</sup>

The tax court found that the term sources, as used in section 6-2.1-2-2(a)(2), was intentionally retained by the legislature in the recodified gross income tax imposition statute and its meaning had been refined by the tax court.<sup>565</sup>

The tax court concluded that the IDSR's interpretation of section 6-2.1-1-2(c)(6) would result in dissimilar applications of the same concept (the sources of gross receipts) in two related gross income tax statutes.<sup>566</sup> Because the tax court endeavors to construe statutes to prevent absurd results it found that section 6-2.1-1-2(c)(6) of the Indiana Code excludes the gross receipts generated by the taxpayer's Indiana destination sales from the definition of gross income.<sup>567</sup>

In sum, the tax court held that the IDSR erroneously subjected the taxpayer's gross receipts from its Indiana destination sales to Indiana's gross income tax.<sup>568</sup> Therefore, the tax court reversed the final determination of the IDSR.<sup>569</sup>

2. *Policy Management Systems Corp. v. Department of State Revenue*<sup>570</sup>—In *Policy Management Systems Corp.*, a corporate taxpayer challenged the final determination of the IDSR finding that the taxpayer owed Indiana gross income tax.<sup>571</sup> In this case, Policy Management Systems Corp. (taxpayer) requested that the tax court determine whether the money the taxpayer receives from customers, as reimbursements for advances the taxpayer makes on behalf of its customers to various state agencies in order to obtain motor vehicle reports (MVRs),<sup>572</sup> is subject to Indiana's gross income tax.<sup>573</sup> In sum, the tax court held that this form of taxpayer income, reimbursements for advances to third parties on behalf of customers, is not subject to Indiana's gross income tax.<sup>574</sup> The tax court remanded the case to the IDSR with instructions to sustain the taxpayer's protest on this issue.<sup>575</sup>

The tax court indicated that "although the taxpayer was incorporated under the laws of South Carolina and maintained its principle [sic] offices in South Carolina," the taxpayer also maintained a service bureau in Indiana during the

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564. *Uniden Am. Corp.*, 718 N.E.2d at 828 (quoting *Indiana-Kentucky Elec. Corp.*, 598 N.E.2d at 663).

565. *See id.* at 828.

566. *See id.*

567. *See id.*

568. *See id.* at 828-29.

569. *See id.* at 829.

570. 720 N.E.2d 20 (Ind. Tax Ct. 1999).

571. *See id.* at 21.

572. An MVR is "a confidential history of accidents, operating violations and other information maintained by a state government agency for each individual licensed as a motor vehicle operator by that agency." *Id.* at 21-22.

573. *See id.*; *see also* IND. CODE 6-2.1-2-2 (2001) (defining gross income tax).

574. *See Policy Management*, 720 N.E.2d at 27.

575. *See id.*



relevant tax years.<sup>576</sup> One of the taxpayer's services included retrieving MVRs and transmitting them to its customers. The tax court noted that the taxpayer's customers pay a fixed fee for each MVR obtained by the taxpayer. The taxpayer's customers also agree to reimburse the taxpayer the cost of assessments by government agencies incurred while retrieving the information.<sup>577</sup>

With respect to the imposition of Indiana's gross income tax, "the taxpayer's beneficial interest in income is central to the receipt of gross income."<sup>578</sup> The taxpayer asserted that it was the agent for its customers, the purported principals, in processing MVRs.<sup>579</sup> The tax court noted that, "[r]eimbursements to an agent for amounts advanced or paid to third parties substantively represent 'pass throughs' of income and therefore are not taxable to the agent."<sup>580</sup> The tax court then contrasted the agency concept with its observation that reimbursements of a taxpayer's *own* expenses are receipts of gross income to the taxpayer.<sup>581</sup> The tax court also found that the IDSR's regulations recognize the non-taxability of an agent's receipts.<sup>582</sup>

Because the taxpayer had the burden to prove that the reimbursements were not subject to Indiana's gross income tax, the tax court determined that in order to prevail, the taxpayer must first demonstrate that it acted as an agent for its customers in processing MVRs and then show that it received the reimbursements as payment for advances to third parties on behalf of customers.<sup>583</sup> The tax court determined that "a party claiming the existence of an agency relationship must prove the following three elements: '(1) a manifestation of consent by the principal to the agent, (2) an acceptance of the authority by the agent, and (3) control exerted by the principal over the agent.'"<sup>584</sup>

In this case, the tax court concluded that the first two elements of the above test were met because the signatures of representatives from both the taxpayer and its customers on the processing agreements represented both the consent of individual customers to the taxpayer's agency status and the taxpayer's acceptance of the agency relationship.<sup>585</sup> However, the tax court found that whether the customer-principal exerted sufficient control over the taxpayer-agent to create an agency relationship was in dispute.<sup>586</sup> The tax court found that while the principal's control need not be complete, "the principal's control cannot

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576. *Id.* at 21.

577. *See id.*

578. *Id.* at 23 (citation omitted). *See also* IND. CODE § 6-2.1-2-2 (2001).

579. *See Policy Management*, 720 N.E.2d at 23.

580. *Id.* (citation omitted).

581. *See id.*

582. *See id.*; *see also* IND. ADMIN. CODE tit. 45, r. 1-1-54 (2001).

583. *See Policy Management*, 720 N.E.2d at 23.

584. *Id.* (citation omitted).

585. *See id.* at 24.

586. *See id.*



simply consist of the right to dictate the accomplishment of a desired result.”<sup>587</sup>

The tax court reviewed the contract terms in this case and determined that the taxpayer’s customers had the right to dictate several aspects the retrieval process.<sup>588</sup> In addition, the taxpayer lacked any flexibility to control the disposition of the MVRs once retrieved.<sup>589</sup> The tax court also noted that the taxpayer could only retrieve the requested information with its own system, unless customers agreed to an alternate method.<sup>590</sup> The tax court focused on the fact that the taxpayer’s customers retained the power to exercise these rights.<sup>591</sup>

The tax court also found that it would be inefficient for the taxpayer to require its customers to pay state agencies directly for MVR requests because of the high volume of requests.<sup>592</sup> The tax court opined that while the Indiana “gross income tax is applicable regardless of any profit being involved . . . the lack of a profit, when considered together with the efficiency” promoted by the taxpayer’s fee arrangement with customers and its billing methods, supported the taxpayer’s claim that it was acting as an agent when retrieving requested MVRs for customers.<sup>593</sup>

The tax court first determined that the taxpayer acted as the agent for its customers, with respect to the processing of the MVR requests, and next considered whether the reimbursements were truly advances by the taxpayer to third parties on behalf of the taxpayer’s customers.<sup>594</sup> The tax court reviewed the relevant contract terms, as well as the conduct of the taxpayer and its customers, and concluded that the plain language of the contracts indicated that the reimbursements represented “pass throughs” of income.<sup>595</sup> The tax court reasoned that the payments were reimbursements for the taxpayer’s advances to various government agencies and not for the taxpayer’s own operating expenses.<sup>596</sup> Moreover, the tax court found that the taxpayer lacked a beneficial interest in the reimbursements.<sup>597</sup> Therefore, the tax court concluded that the taxpayer met its burden to show that its income from agency reimbursements was not subject to the Indiana gross income tax.<sup>598</sup>

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587. *Id.*

588. *See id.* at 25.

589. *See id.*

590. *See id.*

591. *See id.*

592. *See id.* at 26.

593. *Id.* (citation omitted).

594. *See id.*

595. *See id.* at 26-27.

596. *See id.* at 27.

597. *See id.*

598. *See id.*



*D. Indiana Adjusted Gross Income Tax*

1. *Wabash, Inc. v. Department of State Revenue*.<sup>599</sup>—Wabash, Inc. (taxpayer), a manufacturing corporation, appealed from a final determination of the IDSR finding that it erroneously included the taxpayer's parent company, Kearney-National Inc. (KN), on the taxpayer's consolidated tax return.<sup>600</sup> Additionally, the IDSR raised the issue of whether the apportionment method used by the taxpayer to calculate its taxes was correct.<sup>601</sup> The tax court found in favor of the taxpayer on both issues.<sup>602</sup>

The tax court found that the taxpayer is a wholly-owned subsidiary of Kearney-National Holdings II (KNH II), a Delaware corporation doing business in Indiana.<sup>603</sup> KNH II is likewise a wholly-owned subsidiary of Kearney-National Holdings (KNH), a Delaware holding company of KN that lacked Indiana connections. Both companies were housed under the corporate umbrella of KN, which was headquartered in New York. KN considered the acquisition of the Coto Corporation (Coto), and after completing an acquisition study to examine the benefits that Coto could bring to KN, KN acquired Coto. After the merger, all of the taxpayer's operations moved to Coto's plant located in Rhode Island. Thereafter, the taxpayer filed its Indiana adjusted gross income and its supplemental net income tax returns as a consolidated return, listing the taxpayer, KNH II, KNH and KN as corporations. The IDSR determined that KN was erroneously included in the taxpayer's tax return.<sup>604</sup>

The tax court commenced its discussion of this case by addressing the inclusion of KN on the taxpayer's return. Because the tax court found that KN's activities rose above mere solicitation,<sup>605</sup> KN did business in Indiana,<sup>606</sup> KN generated two million dollars worth of sales attributable to Indiana, and KN had Indiana-sourced income,<sup>607</sup> the tax court concluded that KN was properly included in the taxpayer's return under section 6-3-4-14 of the Indiana Code.<sup>608</sup>

Next, the tax court considered whether the apportionment formula used by the taxpayer to calculate its taxes was correct. The tax court found that because the IDSR raised this issue, it had the burden of proving that the taxpayer's Indiana income did not fairly reflect Indiana-sourced income.<sup>609</sup> As background, the tax court explained that in section 6-3-2-2(b) of the Indiana Code, the standard apportionment formula multiplies a company's business income by the

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599. 729 N.E.2d 620 (Ind. Tax Ct. 2000).

600. *See id.* at 621.

601. *See id.*

602. *See id.*

603. *See id.*

604. *See id.* at 621-22.

605. *See* 15 U.S.C. §§ 381-384 (2000).

606. *See* IND. ADMIN. CODE tit. 45, r. 3.1-1-38(7) (2001).

607. *See* IND. CODE § 6-3-2-2 (2001).

608. *See Wabash, Inc.*, 729 N.E.2d at 624; *see also* IND. CODE § 6-3-4-14 (2000).

609. *See Wabash, Inc.*, 729 N.E.2d at 624.



total of its property, payroll and sales factors divided by three to determine the tax (standard formula).<sup>610</sup> The tax court found that if the stated method fails to fairly represent Indiana-sourced income, the regulations also authorize the IDSR or a taxpayer (upon obtaining a ruling from the IDSR) to use another method that produces a more equitable allocation and apportionment of a taxpayer's income.<sup>611</sup>

The tax court observed that previous rulings of the United States Supreme Court, the IDSR and the tax court have recognized that the standard method is the method often used by related corporations to compute their state income taxes.<sup>612</sup> For example, in *Container Corp. of America v. Franchise Tax Board*,<sup>613</sup> the United States Supreme Court "not only affirmed the standard formula but also stated that it has become a benchmark against which other apportionment formulas are judged."<sup>614</sup> The Supreme Court further found that "the standard formula gained wide approval because the property, payroll and sales factors reflect a large share of the activities by which value is generated."<sup>615</sup> Therefore, the tax court concluded that the standard formula could be used unless the IDSR proved that the income attributed to Indiana from using that formula was out of proportion to the amount of business transacted in Indiana.<sup>616</sup>

The tax court observed that the IDSR has acknowledged that the standard formula is the most accepted and recognized method of computing a company's taxes.<sup>617</sup> The tax court reasoned that it should give great weight to the IDSR's longstanding interpretation of its own regulation unless that interpretation would be inconsistent with the regulation itself.<sup>618</sup> The tax court found that the IDSR has also reiterated its preference for the standard method in a series of revenue rulings where the taxpayer sought to use the stacked method.<sup>619</sup>

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610. See *id.* at 625; see also IND. CODE § 6-3-2-2(b) (2001); IND. ADMIN. CODE, tit. 45, r. 3.1-1-39 (1988).

611. See *Wabash, Inc.*, 729 N.E.2d at 625.

612. See *id.*

613. 463 U.S. 159 (1983).

614. *Wabash, Inc.*, 729 N.E.2d at 625.

615. *Id.* See also *Container Corp. of Am.*, 463 U.S. at 183.

616. See *Wabash, Inc.*, 729 N.E.2d at 626.

617. See *id.* at 625; see also IND. ADMIN. CODE, tit. 45, r. 3.1-1-37,-45 (2001) (stating that the IDSR will depart from the standard formula only if the use of such formula works a hardship or injustice upon the taxpayer, results in an arbitrary division of income, or in other respects does not fairly attribute income to Indiana).

618. See *Wabash, Inc.*, 729 N.E.2d at 626.

619. See *id.*; see also Rul. 81-4381 GIT (May 29, 1981) ("The Indiana Department of Revenue has consistently required that a consolidated return use a combined three-factor apportionment formula as the fairest method of reflecting the income derived from Indiana sources."); Rul. 84-6943 ITC (October 3, 1986) ("The basic premise behind a consolidated income tax return is that the group is treated as a single corporation . . . . [A] combined three-factor formula is employed to fairly reflect the income derived from Indiana sources."); Rul. 90-0114 ITC (November 13, 1990) ("The Indiana Department of Revenue forms [ ] do not provide for the



In this case, the tax court held that the IDSR failed to show how the standard formula employed by the taxpayer unfairly reflected the taxpayer's Indiana-sourced income and that it was appropriate for the taxpayer to use the standard formula.<sup>620</sup>

2. *Rockland R. Snyder v. Department of State Revenue*.<sup>621</sup>—In *Snyder*, an individual taxpayer appealed the IDSR's denial of his protest challenging the constitutionality of Indiana's adjusted gross income tax on his wages.<sup>622</sup> In this case, the tax court addressed whether wages are income for the purpose of calculating Indiana's adjusted gross income tax.<sup>623</sup>

Rockland R. Snyder (taxpayer), an Indiana resident, filed Indiana individual income tax returns, in which he acknowledged having received wages, but declared that his wages did not constitute income. In addition, the taxpayer claimed refunds for all state income taxes withheld by his employer during the relevant tax years. The IDSR subsequently assessed the taxpayer for each year's unpaid adjusted gross income taxes.<sup>624</sup>

In evaluating *Snyder*, the tax court reviewed *Richey v. Department of State Revenue*,<sup>625</sup> in which the tax court held that "[t]he constitutional legitimacy of the general assembly's decision to tax income is beyond dispute. The right to tax is a crucial attribute of sovereignty."<sup>626</sup> The tax court also observed that article IX, section 8 of the Indiana Constitution provides: "The general assembly may levy and collect a tax upon income, from whatever source derived, at such rates, in such manner, and with such exemptions as may be prescribed by law."<sup>627</sup> The tax court held that pursuant to the Adjusted Gross Income Tax Act of 1963 (Act),<sup>628</sup> the General Assembly has imposed an adjusted gross income tax.<sup>629</sup> The tax court found that the Act adopts the definition of "adjusted gross income" as the term applies to all individuals, from section 62 of the Internal Revenue Code,<sup>630</sup> with certain modifications,<sup>631</sup> and the Act adopts the definition of "gross income" from section 61(a) of the Internal Revenue Code.<sup>632</sup>

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calculation of income as described by the taxpayer. . . . There are no provisions for separate calculations with a single consolidation to determine Indiana taxable income.").

620. See *Wabash, Inc.*, 729 N.E.2d at 626.

621. 723 N.E.2d 487 (Ind. Tax Ct. 2000).

622. See *id.*

623. See *id.*

624. See *id.*

625. 634 N.E.2d 1375, 1376 (Ind. Tax Ct. 1994).

626. *Snyder*, 723 N.E.2d at 488 (quoting *Richey*, 634 N.E.2d at 1376 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819))).

627. *Snyder*, 723 N.E.2d at 488 (citing IND. CONST. art. IX, § 8).

628. See IND. CODE § 6-3-1-1.

629. See *Snyder*, 723 N.E.2d at 488; see also IND. CODE § 6-3-2-1 (2000).

630. See 26 U.S.C. § 62 (2001).

631. See *Snyder*, 723 N.E.2d at 488; see also IND. CODE § 6-3-1-3.5(a) (2001).

632. See *Snyder*, 723 N.E.2d at 489; see also 26 U.S.C. § 61(a) (2000); IND. CODE § 6-3-1-8 (2001).



Given the Internal Revenue Code's definitions for both adjusted gross income and gross income; the common definition of the terms; an overwhelming body of case law by the United States Supreme Court and the federal circuit courts; and, the tax court's opinions and decisions, the tax court concluded that wages are income for the purpose of computing Indiana's adjusted gross income tax.<sup>633</sup> Consequently, the tax court found that, as a matter of law, the taxpayer's wages were subject to Indiana's adjusted gross income tax and affirmed the final determination of the IDSR.<sup>634</sup>

#### *E. Indiana Gross Retail and Use Taxes*

In *Carroll County Rural Electric Membership Corp. v. State Board of Tax Commissioners*,<sup>635</sup> an Indiana rural electric membership corporation challenged the IDSR's final determination granting the taxpayer's protest for certain prior tax years but finding that the taxpayer's publication would be subject to the Indiana gross retail (sales) and use taxes prospectively.<sup>636</sup> In this case, the IDSR asked the tax court to determine whether the tax court had jurisdiction to hear a taxpayer's appeal from a final determination where the IDSR sustained the taxpayer's protest but determined that the taxpayer's future purchases would not be exempt from the Indiana sales and use taxes.<sup>637</sup>

Each month, Carroll County Rural Electric Membership Corporation (taxpayer) purchased a publication and distributed the publication to all of its members. The IDSR determined that the subject publication failed to meet all of the regulatory requirements to be considered a newspaper and that consequently, future purchases and use of the publication would no longer be exempt from the sales tax.<sup>638</sup>

The tax court reviewed fundamental principles of subject matter jurisdiction and found that every action has three jurisdictional elements: jurisdiction of the subject matter; jurisdiction of the person; and, jurisdiction of the particular case.<sup>639</sup> The tax court found that the general scope of authority conferred upon the tax court is governed by section 33-3-5-2(a)(1) of the Indiana Code.<sup>640</sup> The tax court noted that this statutory provision provides that the tax court is a court of limited jurisdiction, having "exclusive jurisdiction over any case that arises under the tax laws of [Indiana] and that is an initial appeal of a final determination" made by the IDSR.<sup>641</sup> The tax court concluded that because the taxpayer challenged the IDSR's assessment and collection of Indiana's sales and

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633. See *Snyder*, 723 N.E.2d at 491.

634. See *id.*

635. 733 N.E.2d 44 (Ind. Tax Ct. 2000).

636. See *id.* at 46.

637. See *id.*

638. See *id.*; see also IND. CODE § 6-2.5-5-17 (2000) (newspaper exemption).

639. See *Carroll County*, 733 N.E.2d at 47.

640. See *id.*; see also IND. CODE § 33-3-5-2(a)(1) (2001).

641. *Carroll County*, 733 N.E.2d at 47 (quoting IND. CODE § 33-3-5-2(a)(1) (2001)).



use taxes and because the taxpayer appealed from a final determination issued by the IDSR, the taxpayer's appeal fell within the jurisdiction of the tax court.<sup>642</sup>

Next, the tax court addressed the ripeness issue raised by the IDSR. The tax court observed that when ruling upon a ripeness challenge, it must consider both the fitness of the issues for judicial decision and any hardship imposed on the parties by withholding court consideration.<sup>643</sup> In this case, the tax court found a sufficient factual basis for the taxpayer's challenge: whether or not the taxpayer's publication qualified as a newspaper.<sup>644</sup> Consequently, the tax court concluded that the substantive issue in the case was fit for judicial decision.<sup>645</sup>

Next, the tax court considered the IDSR's allegation that the taxpayer failed to state a claim upon which relief could be granted.<sup>646</sup> The tax court noted that "jurisdiction over the particular case refers to the right, authority, and power to hear and determine a specific case within the class of cases over which a court has subject matter jurisdiction."<sup>647</sup> The tax court determined that the taxpayer had completed the statutory requirements to bring this appeal.<sup>648</sup> In summary, the tax court found that the IDSR failed to demonstrate that the tax court lacked jurisdiction over this particular case and denied the IDSR's motion to dismiss.<sup>649</sup>

#### *F. Indiana Inheritance Taxes*

In *Department of State Revenue, Inheritance Tax Division v. Estate of Riggs*,<sup>650</sup> the Inheritance Tax Division of the IDSR appealed a probate court's order denying the IDSR's petition to redetermine the inheritance taxes owed by the transferees of real and personal property owned by Robert E. Riggs (decedent).<sup>651</sup> The sole issue presented for the tax court's consideration in this case was whether the transferees of a decedent who died prior to the effective date of an amendment increasing an exemption to the state's inheritance tax were entitled to the increased exemption.<sup>652</sup> The tax court reversed the probate court's decision and remanded the case with instructions to grant the IDSR's request for a redetermination of the inheritance taxes owed by the transferees.<sup>653</sup>

The decedent died testate while residing in Henry County, Indiana. The decedent's last will and testament bequeathed or devised his entire estate to his

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642. *See id.*

643. *See id.* at 48.

644. *See id.* at 49.

645. *See id.*

646. *See id.* at 49-50; *see also* IND. TR. 12(B)(6) (2001).

647. *Carroll County*, 733 N.E.2d at 50 (quoting *Adler v. Adler*, 713 N.E.2d 348, 352 (Ind. Ct. App. 1999) (citation omitted)).

648. *See id.*; *see also* IND. CODE § 33-3-5-11(a) (2001).

649. *See Carroll County*, 733 N.E.2d at 50.

650. 735 N.E.2d 340 (Ind. Tax Ct. 2000).

651. *See id.* at 341-42.

652. *See id.* at 342.

653. *See id.* at 347.



three children (transferees). After opening the decedent's estate (estate), the estate petitioned the probate court seeking a determination as to whether the transferees were entitled to the one hundred thousand dollar exemption provided for by section 6-4.1-3-10 of the Indiana Code.<sup>654</sup> The probate court entered an order allowing the requested exemption.<sup>655</sup> The IDSR then filed a petition, pursuant to section 6-4.1-7-1 of the Indiana Code, requesting that the probate court grant a rehearing for the purpose of redetermining the amount of inheritance tax due.<sup>656</sup> The probate court conducted a rehearing and later entered an order denying the IDSR's petition.<sup>657</sup>

The tax court explained that at the time of the decedent's death, Indiana's inheritance tax statutes imposed a tax on the privilege of succeeding to certain property rights of deceased persons.<sup>658</sup> The tax court noted that the inheritance tax is imposed on the transfer of ownership of the property as opposed to being imposed on the property itself.<sup>659</sup> In addition, the tax court observed that the inheritance tax is a lien on the property transferred by the decedent, whereby generally, the tax accrues and the lien attaches at the time of the decedent's death.<sup>660</sup> The tax court found that the Indiana inheritance tax statutes are based upon the ownership theory, which has two requirements for imposition of the tax: (1) a transfer from a decedent, (2) of an interest in property that the decedent owned at death.<sup>661</sup>

The tax court explained that the General Assembly has provided for various exemptions to the inheritance tax, including the one at issue in this case.<sup>662</sup> The tax court noted that the amended exemption provided that the "first one hundred thousand dollars (\$100,000) of property interests transferred to a Class A transferee under a taxable transfer or transfers is exempt from the inheritance tax."<sup>663</sup> However, at the time of the decedent's death, adult children were entitled to a five thousand dollar exemption.<sup>664</sup> The tax court observed that while the General Assembly subsequently enacted legislation increasing the exemption, the legislation was silent with respect to whether the amended exemption was effective for transfers of decedents dying before its effective date.<sup>665</sup> However,

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654. *See id.*; *see also* IND. CODE § 6-4.1-3-10 (2000).

655. *See Riggs*, 735 N.E.2d at 342.

656. *See id.*; *see also* IND. CODE § 6-4.1-7-1 (2000).

657. *See Riggs*, 735 N.E.2d at 342.

658. *See id.*; *see also* IND. CODE §§ 6-4.1-2-1 to -4.1-2-7 (2000).

659. *See Riggs*, 735 N.E.2d at 342.

660. *See id.*; *see also* IND. CODE § 6-4.1-8-1 (2000).

661. *See Riggs*, 735 N.E.2d at 343.

662. *See id.*; *see also* IND. CODE §§ 6-4.1-3-1 to -4.1-3-12 (2000).

663. *Riggs*, 735 N.E.2d at 343 (quoting IND. CODE § 6-4.1-3-10 (2000)).

664. *See id.* The Indiana Code provided that the "first five thousand dollars (\$5,000) of property interests which a transferor transfers to each of his children, who is at least twenty-one (21) years of age at the time of the transferor's death, under a taxable transfer or transfers is exempt from the inheritance tax." IND. CODE § 6-4.1-3-9.5 (2000) *repealed by* P.L. 254-1997(ss), § 37.

665. *See Riggs*, 735 N.E.2d at 343; *see also* P.L. 254-1997(ss), § 9.



the tax court concluded that there was no need to interpret the exemption, because it was neither unclear nor ambiguous.<sup>666</sup> The tax court observed that in both its current and pre-amendment forms, the exemption clearly was applicable at the time property interests were "transferred . . . under a taxable transfer or transfers."<sup>667</sup> Therefore, the tax court determined that for purposes of applying the exemption, the pivotal finding for the probate court was the time of transfer of the decedent's assets.<sup>668</sup> The tax court held that if the transfer of property took place before the effective date of the amended exemption, then only the pre-amendment amount was available to the transferees.<sup>669</sup>

The tax court explained that in Indiana, a decedent's death marks the point when his property transfers to his beneficiaries.<sup>670</sup> The tax court found that section 29-1-7-23 of the Indiana Code provides that "[w]hen a person dies, his real and personal property[ ] passes to persons to whom it is devised by his last will . . . ; but it shall be subject to the possession of the personal representative."<sup>671</sup> Therefore, because the decedent's assets were transferred under the pre-amendment exemption amount, that amount is all that the beneficiaries could claim.<sup>672</sup>

The tax court rejected the estate's argument that the General Assembly intended to apply the amended exemption retroactively.<sup>673</sup> The tax court noted that Indiana jurisprudence does not favor retroactive application of statutes and amendments.<sup>674</sup> However, the tax court noted that exceptions to the general rule exist and that retroactive application may be permitted where the new legislation only changes a mode of procedure or where a statute is remedial.<sup>675</sup> The court found that to decide whether a statute is remedial, the tax court will examine, among other things, the alleged defect or mischief that a statute or amendment seeks to cure.<sup>676</sup> The tax court reviewed the amended exemption and determined that it should only be applied prospectively, as it was neither procedural nor remedial in nature.<sup>677</sup> Moreover, the tax court found no evidence suggesting that the General Assembly intended to make the exemption's amendment retroactive.<sup>678</sup> The tax court also refused the estate's argument that the General Assembly's silence was an expression of its intention to apply the amendment to

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666. See *Riggs*, 735 N.E.2d at 343.

667. *Id.* See also IND. CODE § 6-4.1-3-10 (2000).

668. See *Riggs*, 735 N.E.2d at 343.

669. See *id.*

670. See *id.*

671. *Id.* at 343-44. See also IND. CODE § 29-1-7-23 (2000).

672. See *Riggs*, 735 N.E.2d at 344.

673. See *id.*

674. See *id.*

675. See *id.*

676. See *id.*

677. See *id.* at 345.

678. See *id.*



the exemption retroactively.<sup>679</sup> The tax court found that the estate failed to demonstrate a strong and compelling reason to apply the amendment retroactively.<sup>680</sup> Therefore, the tax court declined to apply the amended exemption retroactively.<sup>681</sup>

In sum, the tax court ruled that because the decedent died approximately seven months before the effective date of the amendment increasing the exemption's value, the increased exemption amount was not available to the transferees in determining their inheritance taxes.<sup>682</sup> The tax court also found that the probate court erred in denying the IDSR's request for a redetermination of the inheritance taxes.<sup>683</sup> As a result, the tax court reversed the decision of the probate court and remanded the case to the probate court with instructions to redetermine the inheritance taxes owed by the transferees.<sup>684</sup>

### *G. Indiana Controlled Substance Excise Tax*

1. *Hurst v. Department of State Revenue*<sup>685</sup>—In *Hurst*, an individual taxpayer challenged the IDSR's finding that the taxpayer owed controlled substance excise tax (CSET).<sup>686</sup> In this case, Gary G. Hurst (taxpayer) raised two issues for the tax court's review.<sup>687</sup> First, the taxpayer asked the tax court to determine whether or not he possessed or received delivery of a substance alleged to be marijuana so as to place him within the purview of the CSET statute.<sup>688</sup> Second, he requested a finding of whether the substance was actually marijuana.<sup>689</sup> In this case, the tax court reversed the CSET assessment against the taxpayer.<sup>690</sup>

In *Hurst*, the taxpayer was charged with the crime of conspiracy to deal marijuana in an amount greater than ten pounds.<sup>691</sup> The IDSR subsequently filed a jeopardy finding and a jeopardy assessment notice and demand against the

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679. See *id.* at 346.

680. See *id.*

681. See *id.*

682. See *id.* at 346-47.

683. See *id.* at 347.

684. See *id.*

685. 721 N.E.2d 370 (Ind. Tax Ct. 1999).

686. See *id.* at 371.

687. See *id.*

688. See *id.*; see also IND. CODE § 6-7-3-5 (2000).

689. See *Hurst*, 721 N.E.2d at 371.

690. See *id.* at 376.

691. See *id.* at 372; see also IND. CODE § 35-48-4-10 (a)(1)(D) (2000). This charge was ultimately dismissed by the state. The taxpayer eventually pled guilty to the charge of possession of marijuana (under 30 grams), a class A misdemeanor, which was based on the discovery of a small amount of marijuana inside the taxpayer's home after the State Police performed a search. The subject CSET assessment did not include the marijuana that was found in the taxpayer's home. See *Hurst*, 721 N.E.2d at 372; see also IND. CODE § 35-48-4-11(1) (2000).



taxpayer alleging that the taxpayer owed CSET and penalties. After the IDSR issued its findings denying the taxpayer's written protest challenging the CSET assessment, the taxpayer initiated this original tax appeal with the tax court.<sup>692</sup>

First, the tax court considered whether the taxpayer possessed or received delivery of the substance alleged to be marijuana, thereby making him liable under the CSET statute.<sup>693</sup> The tax court reviewed the CSET statute along with related statutes and determined that in order to be liable under the CSET statute, a taxpayer was required to manufacture, possess, or serve as an actor in the actual or constructive transfer of a controlled substance.<sup>694</sup> The tax court reviewed the evidence in the case and found no evidence implicating the taxpayer in the manufacture of a controlled substance.<sup>695</sup> The tax court focused its analysis on whether the taxpayer either possessed, received, or delivered or organized delivery of the subject substance.<sup>696</sup> The tax court disagreed with the IDSR's assertion that the evidence allowed for the reasonable inference that the taxpayer either received delivery of the marijuana or organized the delivery of the marijuana.<sup>697</sup> The tax court also concluded that the evidence presented in the case failed to demonstrate the taxpayer's participation in the delivery of the marijuana.<sup>698</sup>

Next, the tax court analyzed the issue of possession of a controlled substance and opined that possession may be actual or constructive.<sup>699</sup> The tax court found that the majority of the alleged marijuana was confiscated by law enforcement personnel and stored at an Indiana State Police post prior to the taxpayer's alleged possession.<sup>700</sup> In addition, the tax court determined that there was no evidence that would prove that the taxpayer had the intent or the ability to exercise control over the marijuana.<sup>701</sup> The tax court also found no evidence that the taxpayer leased the delivery vehicle; that the taxpayer drove the delivery vehicle; or, that the taxpayer knew what was stored inside the delivery vehicle prior to his arrest and communication with the Indiana State Police.<sup>702</sup>

The tax court emphasized that although it did not believe that the taxpayer encountered the driver of the vehicle carrying the marijuana by mere coincidence, the taxpayer's liability for the CSET was not established partly because the Indiana State Police arrested the taxpayer quickly, thereby hampering his activity with respect to the marijuana.<sup>703</sup> The tax court indicated that it was

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692. See *Hurst*, 721 N.E.2d at 372.

693. See *id.* at 373.

694. See *id.*; see also IND. CODE § 6-7-3-5 (2000).

695. See *Hurst*, 721 N.E.2d at 373.

696. See *id.*

697. See *id.*

698. See *id.* at 374.

699. See *id.*

700. See *id.* at 375.

701. See *id.* at 376.

702. See *id.*

703. See *id.*



“not persuaded by a preponderance of the evidence that [the taxpayer] either orchestrated or received delivery of the marijuana or that [the taxpayer] possessed the requisite intent or ability to maintain dominion and control over the marijuana in question.”<sup>704</sup> The tax court concluded that as a result of its reversal of the CSET assessment, it was not necessary to discuss the identity of the substance because the issue was moot.<sup>705</sup>

2. *Hall v. Department of State Revenue*.<sup>706</sup>—In *Hall*, individual taxpayers challenged the IDSR’s finding that the taxpayers owed CSET.<sup>707</sup> In this case, the tax court considered whether or not the Halls (taxpayers) possessed the marijuana in question, making them liable under the CSET statute.<sup>708</sup>

Both of the taxpayers were arrested and were issued CSET assessments for unpaid taxes.<sup>709</sup> Keith Hall was convicted of Class D felony marijuana possession, while all charges against Mary Hall were dropped.<sup>710</sup> The tax court determined that the CSET was a punishment subject to the constraints of the Double Jeopardy Clause<sup>711</sup> and that the imposition of the CSET after a criminal conviction violated the Double Jeopardy Clause.<sup>712</sup> Therefore the tax court ordered the CSET assessment against Keith Hall vacated.<sup>713</sup> Conversely, the tax court held that because Mary Hall suffered no previous criminal prosecution or punishment, the Double Jeopardy argument did not apply to her and that her CSET assessment would not be vacated.<sup>714</sup>

On appeal, the supreme court ruled that the CSET assessment against the taxpayers did not violate the Double Jeopardy Clause, the taxpayers’ rights to procedural due process, or their privileges against self-incrimination.<sup>715</sup> The supreme court reasoned that the CSET assessment in Keith Hall’s case did not violate the Double Jeopardy clause because it was assessed prior to the criminal action, which was the second jeopardy.<sup>716</sup> The taxpayers next filed a motion to vacate and dismiss the CSET assessment with the tax court on equitable double jeopardy, cruel and unusual punishment, and disproportionality grounds.<sup>717</sup> The

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704. *Id.*

705. *See id.*

706. 720 N.E.2d 1287 (Ind. Tax Ct. 1999).

707. *See id.* at 1288.

708. *See id.*

709. *See id.*; *see also* IND. CODE 6-7-3-5 (2000).

710. *See* IND. CODE § 35-48-4-11 (2000); *Hall*, 720 N.E.2d at 1288; *see also* *Hall v. Dep’t of State Revenue*, 641 N.E.2d 694 (Ind. Tax Ct. 1994) *aff’d in part and rev’d in part*, 660 N.E.2d 319 (Ind. 1995) [hereinafter *Hall I*].

711. *See* U.S. CONST. amend. V.

712. *See id.*; *see also* *Hall I*, 641 N.E.2d at 695.

713. *See Hall*, 720 N.E.2d at 1289.

714. *See id.*

715. *See id.*; *see also* *Hall v. Dep’t of State Revenue*, 660 N.E.2d 319, 321-22 (Ind. 1995) [hereinafter *Hall II*].

716. *See Hall*, 720 N.E.2d at 1289; *see also* *Hall II*, 660 N.E.2d at 321.

717. *See Hall*, 720 N.E.2d at 1289.



tax court overruled and denied the taxpayers' motion.<sup>718</sup> It found that the issue of excessive fines was premature and possibly irrelevant because, at that time, the tax court did not determine whether or not the taxpayers were liable for the CSET tax.<sup>719</sup>

The tax court observed that in this case, there was no question of possession with respect to Keith Hall as he had admitted to possessing the marijuana.<sup>720</sup> The tax court then addressed whether or not Mary Hall possessed the marijuana involved in this case under the CSET statute.<sup>721</sup> Based on the facts of the case, the tax court determined that the pivotal inquiry was whether or not the application of the common law doctrine of constructive possession to the facts in this case demonstrated that Mary Hall constructively possessed the marijuana.<sup>722</sup> The tax court analyzed the factors and concluded that the facts and evidence presented failed to show that Mary Hall had the ability or the intent to exercise dominion and control over the marijuana and that the evidence confirmed that she lacked constructive possession.<sup>723</sup>

The tax court noted that it was "in no way expressing that it has full confidence in Mary Halls' purported innocence."<sup>724</sup> However, the tax court reiterated that the facts and evidence and any inferences drawn from them did not establish the intent as well as the ability to exercise dominion and control over the marijuana.<sup>725</sup> Consequently, the tax court affirmed the IDSR's finding that Keith Hall was liable for the CSET assessment.<sup>726</sup> However, the tax court reversed the CSET assessment with respect to Mary Hall.<sup>727</sup>

3. *Adams v. Department of State Revenue*.<sup>728</sup>—In *Adams*, an individual taxpayer challenged the IDSR's finding that the taxpayer owed CSET.<sup>729</sup> In this case, the tax court considered whether the exclusionary rule of evidence applied rendering the CSET assessment invalid.<sup>730</sup> The CSET assessment against Adams (taxpayer) was based upon cocaine possessed by the taxpayer discovered in a safe deposit box. Prior to the CSET assessment, the taxpayer was charged with dealing in cocaine, a class A felony,<sup>731</sup> and for possession of cocaine, a class C

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718. See *id.*; see also *Hall v. Dep't of State Revenue*, No. 49T10-9306-TA-00036 (Ind. Tax Ct. July 6, 1998) (unpublished order denying motion to vacate) [hereinafter *Hall III*].

719. See *Hall*, 720 N.E.2d at 1289.

720. See *id.* at 1291.

721. See *id.*

722. See *id.*

723. See *id.* at 1292.

724. *Id.*

725. See *id.*

726. See *id.*

727. See *id.*

728. 730 N.E.2d 840 (Ind. Tax Ct. 2000), *trans. granted, vacated by* No. 49T10-0011-TA-628, 2000 Ind. LEXIS 1098 (Ind. Nov. 3, 2000).

729. See *id.* at 841; see also IND. CODE § 6-7-3-13 (2000).

730. See *Adams*, 730 N.E.2d at 841.

731. See IND. CODE § 35-48-4-1(b).



felony.<sup>732</sup> In its review of the criminal case, the tax court found that the trial court ruled that Indiana “violated the [taxpayer’s] rights under both the state and federal constitutions when it seized the cocaine.”<sup>733</sup> The tax court indicated that one day after the CSET assessment was prepared, the trial court granted Indiana’s motion to dismiss the criminal charges against the taxpayer as a result of a ruling to suppress the evidence.<sup>734</sup>

In its analysis, the tax court discussed the application of the exclusionary rule to CSET cases.<sup>735</sup> The court of appeals previously dealt with the same taxpayer, the same search and the same cocaine in *Adams v. State*.<sup>736</sup> The tax court noted that in that case, the taxpayer, as a criminal defendant, was charged with possession of and dealing in cocaine.<sup>737</sup> The tax court explained that discovery of the subject cocaine in the taxpayer’s house resulted from a search warrant that was based on evidence that was later suppressed.<sup>738</sup> The court of appeals held that “[f]ourth Amendment protections, *specifically*, the exclusionary rule apply to the CSET when a search warrant has been based on *judicially determined illegally seized evidence*.”<sup>739</sup> Further, the tax court observed that the court of appeals disqualified the seizure of the cocaine found in the taxpayer’s house based on the fruit of the poisonous tree doctrine.<sup>740</sup> The tax court agreed with the court of appeals’ decision that extended the exclusionary rule to Indiana’s CSET when the assessment is clearly based on judicially determined illegally seized evidence.<sup>741</sup>

As a result, the tax court reversed the IDSR’s assessment determination that the taxpayer owed CSET.<sup>742</sup> Moreover, the tax court ordered the IDSR to immediately refund to the taxpayer any amounts previously collected and applied to the subject CSET assessment.<sup>743</sup>

#### *H. Indiana Gaming Card Excise Tax*

In *Muncie Novelty Co. v. Department of State Revenue*,<sup>744</sup> Muncie Novelty Co. (taxpayer) challenged the IDSR’s finding that the taxpayer owed gaming card excise tax (GCET).<sup>745</sup> In addition, the taxpayer appealed a civil penalty levied

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732. See *Adams*, 730 N.E.2d at 841; see also IND. CODE § 35-48-4-1(b)(1).

733. *Adams*, 730 N.E.2d at 842.

734. See *id.*

735. See *id.*

736. 726 N.E.2d 390 (Ind. Ct. App. 2000).

737. See *Adams*, 730 N.E.2d at 843.

738. See *id.*

739. *Id.* (quoting *Adams*, 726 N.E.2d at 395).

740. See *id.*

741. See *id.*

742. See *id.* at 843-44.

743. See *id.* at 844.

744. 720 N.E.2d 779 (Ind. Tax Ct. 1999).

745. See *id.*



against it by the IDSR for failure to keep adequate records of the taxpayer's sales of gaming items.<sup>746</sup> The tax court found in favor of the IDSR with respect to both of the above issues and affirmed the final determination of the IDSR.<sup>747</sup> The tax court remanded the case to the IDSR for a calculation of the amount of the tax, penalty and interest due.<sup>748</sup>

The tax court explained that "the General Assembly enacted the Charity Gaming Act (Act) to allow charitable and other non-profit organizations to conduct games of chance in order to raise funds for those organizations."<sup>749</sup> The tax court also found that the legislature subsequently amended the Act to shift enforcement powers under it from the Indiana Secretary of State to the IDSR.<sup>750</sup>

The taxpayer in this case manufactured and distributed gambling devices that were shipped across the United States and sold to both qualified and not qualified organizations.<sup>751</sup> In order to conduct a charity gaming event, a qualified organization is required to obtain a license from the IDSR.<sup>752</sup> And, all qualified organizations are required to purchase their gambling devices from a licensed supplier such as the taxpayer.<sup>753</sup> When a qualified organization purchases gambling devices from the taxpayer, the taxpayer was required to charge the qualified organization the ten percent GCET.<sup>754</sup> Alternatively, the tax court noted that if a not-qualified organization purchased gambling devices from the taxpayer, a five percent sales tax was imposed on the transaction.<sup>755</sup>

The tax court determined that when a customer purchased an item from the taxpayer, the taxpayer's employees inquired as to whether the customer was purchasing on behalf of a qualified organization.<sup>756</sup> If so, the taxpayer charged the GCET; but if not, the taxpayer charged the sales tax.<sup>757</sup> However, some of the taxpayer's customers often preferred to pay the taxpayer with cash and some customers suggested to the taxpayer that no invoices be created for the

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746. *See id.* at 780.

747. *See id.*

748. *See id.* at 783.

749. *Id.* at 780. *See also* Act of Mar. 16, 1990, Pub. L. No. 32, § 13-15, 1990 Ind. Acts 1122, 1129-33.

750. *See Muncie Novelty Co.*, 720 N.E.2d at 780; *see also* Act of Feb. 26, 1992, Pub. L. No. 24, §§ 45-58, 1992 Ind. Acts 1960, 1992-2017; IND. CODE § 4-32-15-1 (2000) (imposing an excise tax of ten percent on sales of pull-tabs, punchboards and tip boards (gambling devices)).

751. *See Muncie Novelty Co.*, 720 N.E.2d at 780; *see also* IND. CODE § 4-32-6-20 (2000) (defining a qualified organization).

752. *See Muncie Novelty Co.*, 720 N.E.2d at 780; *see also* IND. ADMIN. CODE, tit. 45, r. 18-2-1 (2001) (explaining the application process for a qualified organization).

753. *See Muncie Novelty Co.*, 720 N.E.2d at 780; *see also* IND. ADMIN. CODE, tit. 45, r. 18-3-2 (2001) (defining an allowable event).

754. *See Muncie Novelty Co.*, 720 N.E.2d at 780; *see also* IND. ADMIN. CODE, tit. 45, r. 18-5-2 (2001) (explaining requirements for imposing excise tax).

755. *See Muncie Novelty Co.*, 720 N.E.2d at 780.

756. *See id.*

757. *See id.*



transactions.<sup>758</sup> The tax court found that in such situations, the taxpayer charged the customers sales tax instead of GCET.<sup>759</sup>

In order to determine what amount of tax to charge, it is necessary to know who the taxpayer's Indiana customers are because otherwise, neither the taxpayer or IDSR could conduct an audit to determine the correct amount of tax.<sup>760</sup> The tax court found that in the absence of this information, the IDSR presumes that the taxpayer's cash sales are to qualified customers.<sup>761</sup>

Next, the tax court considered whether it was reasonable to assess the ten percent GCET when the taxpayer did not provide any information identifying its cash-paying customers as required by the regulations.<sup>762</sup> The tax court rejected the taxpayer's assertion that it identified cash paying customers from past sales and that it honored customer requests to remain anonymous.<sup>763</sup> The tax court also rejected the taxpayer's contention that it had no tools available to determine the status of its Indiana customers.<sup>764</sup> Consequently, the tax court concluded that the taxpayer knew the identity of its "unidentified customers," and that the taxpayer had the opportunity and the ability to easily ascertain whether such customers were qualified.<sup>765</sup> As a result, the tax court concluded that it was reasonable for the IDSR to presume that all of the unidentified customers were qualified and owed the ten percent GCET, thereby making the taxpayer liable for the GCET on all sales to its unidentified customers.<sup>766</sup>

Next, the tax court addressed the assessment of a civil penalty against the taxpayer for failure to comply with the reporting requirements discussed above.<sup>767</sup> Sections 4-32-12-2 and -3 of the Indiana Code authorize the IDSR to impose civil penalties upon either a qualified organization or an individual.<sup>768</sup> The IDSR fined the taxpayer less than the maximum amount.<sup>769</sup> The tax court held that while it did not find that the taxpayer's violation of the reporting requirements found in section 4-32-12-3 of the Indiana Code constituted a fraud on the IDSR, the taxpayer's conduct undermined the public confidence in the

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758. *See id.*

759. *See id.*

760. *See id.* at 781.

761. *See id.*

762. *See id.*

763. *See id.* at 781-82.

764. *See id.* The tax court noted that the IDSR maintained a list of qualified Indiana organizations which was readily available to the taxpayer. The tax court also noted that the taxpayer could also have communicated directly with the IDSR concerning the status of a particular customer. *See id.*

765. *Id.* at 782.

766. *See id.*; *see also* IND. ADMIN. CODE, tit. 45, r.18-4-2 (2001) (mandating that licensed manufacturer must keep detailed records).

767. *See Muncie Novelty Co.*, 720 N.E.2d at 782.

768. *See id.*; *see also* IND. CODE §§ 4-32-12-2, -3 (2000).

769. *See Muncie Novelty Co.*, 720 N.E.2d at 782.



IDSR.<sup>770</sup> The tax court concluded that the fine imposed was not excessive and was, therefore, reasonable.<sup>771</sup>

### *I. Indiana Motor Vehicle Excise Tax*

In *Bruns v. Department of State Revenue*,<sup>772</sup> spouses challenged the final determination of the IDSR assessing the motor vehicle excise tax (MVET).<sup>773</sup> In this case, the tax court considered whether or not Dr. and Mrs. Bruns (taxpayer) were liable for payment of the MVET assessed against the taxpayer by the IDSR.<sup>774</sup>

Dr. Bruns was a physician employed in Indiana who maintained a permanent residence in Illinois. His driver's license and license plates were issued in Illinois, he voted in Illinois, and paid income taxes as an Illinois resident. Due to his employment, Dr. Bruns drove to Indiana on Monday mornings to begin his work week and during the week, he would sometimes stay overnight in a rooming house located in Indiana. The taxpayer returned to his domicile in Illinois on Friday nights.<sup>775</sup>

First, the tax court addressed liability under the MVET statute and indicated that the determining factor to trigger liability was whether a person lived in Indiana.<sup>776</sup> The tax court explained that excise taxes such as the MVET are levies on an activity or event.<sup>777</sup> The tax court also explained that an excise tax includes taxes sometimes designated by statute or referred to as privilege taxes.<sup>778</sup> Indiana imposes an annual license excise tax on vehicles required to be registered in Indiana under the motor vehicle laws of the state.<sup>779</sup> The statute requires that "[w]ithin sixty (60) days of becoming an Indiana resident, a person must register all motor vehicles owned by the person" that will be operated on Indiana roads.<sup>780</sup> The tax court also referred to another statute that in part defines an Indiana resident as: "a person who has been living in Indiana for at least one hundred eighty-three (183) days during a calendar year and who has a legal residence in another state."<sup>781</sup>

The tax court observed that in *Croop v. Walton*,<sup>782</sup> the Indiana Supreme Court

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770. See *id.*; see also IND. CODE § 4-32-12-3 (2000).

771. See *Muncie Novelty Co.*, 720 N.E.2d at 783.

772. 725 N.E.2d 1023 (Ind. Tax Ct. 2000).

773. See *id.* at 1025; see also IND. CODE §§ 6-6-5-1 to -16 (2000) (describing the motor vehicle excise tax).

774. See *Bruns*, 725 N.E.2d at 1025.

775. See *id.*

776. See *id.* at 1026.

777. See *id.*

778. See *id.*

779. See *id.*; see also IND. CODE §§ 6-6-5-2, -6 (2000).

780. *Bruns*, 725 N.E.2d at 1026 (quoting IND. CODE § 9-18-2-1 (2000)).

781. *Id.* (quoting IND. CODE § 9-13-2-78(1) (2000)).

782. 157 N.E. 275 (Ind. 1927).



dealt with facts similar to those in *Bruns*. In *Croop*, the supreme court determined that “when a person has residences in different states, that person is taxable at the original domicile, *unless* opening of the second home involved abandonment of the original domicile.”<sup>783</sup> And, with regard to residency, the supreme court has held that a “contextual determination [should] be made by a court upon a consideration of the individual facts of any case.”<sup>784</sup>

Accordingly, the tax court determined that the issue of MVET liability in this case would hinge on the evidence presented by the parties.<sup>785</sup> After reviewing the evidence, the tax court concluded that the taxpayer submitted uncontroverted evidence that, although his car was in an Indiana parking garage for a period greater than 183 days, he in fact was not present in Indiana for the requisite 183 days or for a period greater than 4,392 hours.<sup>786</sup> The tax court reasoned that even if the taxpayer’s occupation of the Indiana rooming house amounted to living in Indiana, the evidence before it was that the taxpayer was not present in Indiana for at least 183 days.<sup>787</sup> Moreover, the tax court held that absent any statute allowing dual registration of one car in two states, it would not require the taxpayer to violate the laws of his home state by registering his car in Indiana.<sup>788</sup> The tax court held that rather than being subject to the MVET statute, the taxpayer would be subject to section 9-18-2-2 of the Indiana Code, which allows a nonresident to operate a vehicle on Indiana roads without registering the vehicle or paying the MVET if the vehicle is properly registered in the jurisdiction where the nonresident resides.<sup>789</sup>

The tax court concluded that the taxpayer was a resident of Illinois and only worked as an employee in Indiana.<sup>790</sup> The tax court reasoned that based on section 9-18-2-2 of the Indiana Code, the legislature did not intend to force multiple taxation on people whose vehicles were properly registered in other states.<sup>791</sup> Therefore, the tax court reversed the final determination of the IDSR that the taxpayer was liable for the MVET.<sup>792</sup>

### *J. Indiana Public Lawsuit*

In *Graber v. State Board of Tax Commissioners*,<sup>793</sup> residents and real

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783. *Bruns*, 725 N.E.2d at 1027 (citing *Croop*, 157 N.E. at 277-78).

784. *Id.* (quoting *In Evrard*, 333 N.E.2d 765, 768 (Ind. 1975) (establishing clarification of laws regarding voting and residency)).

785. *See id.* at 1028.

786. *See id.*

787. *See id.*

788. *See id.*; *see also* 625 ILL. COMP. STAT. 5/3-401(a) (2000) (stating that it shall be unlawful for any owner of a vehicle to allow that vehicle to be driven without being registered).

789. *See Bruns*, 725 N.E.2d at 1028; *see also* IND. CODE § 9-18-2-2 (2000).

790. *See Bruns*, 725 N.E.2d at 1028.

791. *See id.*

792. *See id.* at 1029.

793. 727 N.E.2d 802 (Ind. Tax Ct. 2000).



property owners (petitioners) of five townships in Daviess County, Indiana, challenged the decision of the ISBTC to approve a lease agreement for a new elementary school building between the North Daviess Community School Corporation (School Corporation) and the North Daviess School Building Corporation.<sup>794</sup> The tax court decided that the petitioners would be required to post a bond in order to continue prosecuting this public lawsuit.<sup>795</sup> In order to avoid posting a bond, the petitioners must present sufficient evidence showing that the ISBTC's approval was arbitrary and capricious, an abuse of discretion, unsupported by substantial evidence or, in excess of statutory authority.<sup>796</sup>

The legislature has directed the ISBTC to consider several factors when determining whether to approve a school building construction project (and by implication the approval of a lease for a newly constructed school building) including: the current and proposed square footage of school building space per student; enrollment patterns within the school corporation; the age and condition of the current school facilities; the cost per square foot of the school building construction project; the effect that completion of the school building construction project would have on the school corporation's tax rate; and, any other pertinent matter.<sup>797</sup> The controlling statute does not require the ISBTC to assign greater weight to any one of the listed factors nor does the ISBTC have to consider any single factor dispositive in reaching its decision.<sup>798</sup> However, as the tax court cautioned, the ISBTC must actually consider each of the listed factors and failure to do so constitutes an abuse of discretion by the ISBTC.<sup>799</sup>

The petitioners contended that the ISBTC failed to consider the sixth of the above-listed factors concerning any other "pertinent matter."<sup>800</sup> However, the tax court found that the ISBTC considered both the alleged soil and wastewater problems with the proposed construction site, and the educational needs of Amish students within the school district.<sup>801</sup> Therefore, the tax court determined that the petitioners failed to present evidence showing that the ISBTC failed to consider the listed statutory factors.<sup>802</sup>

The tax court held that the petitioners could have shown that a substantial issue for trial existed by presenting evidence that, despite having considered the proper factors, the ISBTC's approval was nevertheless arbitrary and capricious, constituted an abuse of discretion, was not supported by substantial evidence or exceeded statutory authority.<sup>803</sup> However, the tax court concluded that the

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794. *See id.* at 804.

795. *See id.* at 810.

796. *See id.* at 806.

797. *Id.* at 806-07. *See also* IND. CODE § 6-1.1-19-4.2 (2000).

798. *See Graber*, 727 N.E.2d at 807.

799. *See id.*

800. *Id.* at 808.

801. *See id.*

802. *See id.*

803. *See id.*



petitioners did not make such a showing.<sup>804</sup>

The tax court referred to its previous holding in *Boaz v. Bartholomew Consolidated School Corp.*,<sup>805</sup> where it held that "[t]he decision to implement [educational programs] is one properly delegated to the local school corporation, the Indiana Department of Education, and the State Board of Education."<sup>806</sup> In that case, the tax court further determined that, "[i]t is not the function of the State Board to pass judgment on the implementation of educational programs. Rather, the State Board is to analyze the School Corporation's need for capital construction in light of the School's educational programs."<sup>807</sup>

In the instant case, the tax court found that the petitioners did not produce evidence demonstrating that the ISBTC abused its discretion or acted arbitrarily or capriciously in approving the subject lease agreement.<sup>808</sup> Therefore, the tax court concluded that the petitioners did not show that a substantial issue for trial existed with respect to the school corporation's choice to build a single elementary school building.<sup>809</sup>

Next, the tax court evaluated whether the petitioners demonstrated that a substantial issue for trial existed concerning the soil and wastewater at the proposed construction site.<sup>810</sup> The tax court accepted the ISBTC's reasoning that the Board of Trustees for the North Daviess Community Schools could be trusted to employ competent professionals to address soil and wastewater concerns.<sup>811</sup>

The tax court concluded that the evidence presented by the petitioners did not raise substantial issues for trial.<sup>812</sup> Accordingly, the tax court held that the petitioners would be required to post a sufficient bond pursuant to section 34-13-5-7 of the Indiana Code.<sup>813</sup> Finally, the tax court considered the amount of the bond and noted the school corporation's estimate of costs for a one-year delay in completing the new elementary school building.<sup>814</sup> Given the lack of conflicting information from the petitioners and noting the speculation inherent in such a calculation, the tax court found that the bond amount requested by the School Corporation was reasonable.<sup>815</sup>

As a result, the tax court ordered the petitioners to post bond with surety in the amount requested by the School Corporation and to submit the bond to the tax court for approval within ten days from the date of the tax court's order.<sup>816</sup>

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804. *See id.*

805. 654 N.E.2d 320 (Ind. Tax Ct. 1995).

806. *Graber*, 727 N.E.2d at 808 (citing *Boaz*, 654 N.E.2d at 325-26).

807. *Id.* (citing *Boaz*, 654 N.E.2d at 325-26).

808. *See id.* at 809.

809. *See id.*

810. *See id.*

811. *See id.*

812. *See id.*

813. *See id.*; *see also* IND. CODE § 34-13-5-7 (2000).

814. *See Graber*, 727 N.E.2d at 809-10.

815. *See id.* at 810.

816. *See id.*



The tax court held that if the required bond was not filed within ten days from the date of the tax court's order, the present case would be dismissed pursuant to section 34-13-5-7(c) of the Indiana Code.<sup>817</sup>

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817. *See id.*; *see also* IND. CODE § 34-13-5-7(c) (2000).



# RECENT DEVELOPMENT IN INDIANA TORT LAW

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## INTRODUCTION

Between October 1999 and October 2000, Indiana courts rendered numerous decisions in the area of tort law that have clarified existing rules of law, recognized new theories, and provided guidance not only to lower courts, but to attorneys and litigants. Likewise, legislation adopted by the General Assembly took effect that changes the face of wrongful death law. This Article addresses the past year's cases and legislation and analyzes their effect on the practice of tort law.

## I. WRONGFUL DEATH

### A. *Adult Wrongful Death Statutes*

Wrongful death and survival actions are perhaps the most fascinating and rapidly changing aspect of tort law in Indiana. In addition to the highly emotional nature of such cases, wrongful death and survival claims typically present novel and complex legal issues for attorneys and judges.

Under traditional principles of common law in Indiana, there was no right of action or remedy for the wrongful death of another. However, with the passing of the original Wrongful Death Act in 1852, our tort system changed. Since that time, Indiana's Adult Wrongful Death Act has undergone numerous substantive changes. However, our courts continue to apply the principle that, because a cause of action for wrongful death is purely statutory in nature and in derogation of the common law, the Wrongful Death Act must be strictly construed.<sup>1</sup>

Today, the damages recoverable in an action for the wrongful death of an adult are, presumably, based on a strict reading of the statute, and the foundation for measuring these damages is the pecuniary loss suffered by those for whose benefit that action may be maintained; namely, the class of beneficiaries set forth in the statute. Pecuniary loss has been defined as the reasonable expectation of pecuniary benefit from the continued life of the deceased, to be inferred from proof of assistance by way of money, services, or other material benefits rendered by the deceased prior to his or her death.<sup>2</sup> In its present form, Indiana's Adult Wrongful Death Act is comprised of two statutes. The first statute applies

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1. See *Robinson v. Wroblewski*, 679 N.E.2d 1348 (Ind. Ct. App. 1997); *Ed Wiersma Trucking Co. v. Pfaff*, 643 N.E.2d 909 (Ind. Ct. App. 1994); *Southlake Limousine & Coach, Inc. v. Brock*, 578 N.E.2d 677 (Ind. Ct. App. 1991).

2. See *Lustick v. Hall*, 403 N.E.2d 1128 (Ind. Ct. App. 1980).



to individuals who do not classify as a "child" pursuant to Indiana Code section 34-23-2-1 and who are either married or leave dependent children or dependent next of kin. The second statute, Indiana Code section 34-23-1-2, applies to unmarried adult persons who leave no dependent children or dependent next of kin. This statute was recently passed by the Indiana General Assembly, and applies only to actions that accrue on or after January 1, 2000. The key to distinguishing which of the two statutes applies is to investigate and analyze the issue of dependency when there is no surviving spouse.

1. *Adult Wrongful Death: Dependency.*—The first of Indiana's two adult wrongful death statutes allows a personal representative of the decedent's estate to recover both economic and non-economic damages for the death of an individual caused by the wrongful act or omission of another. The non-economic damages inure to the exclusive benefit of the decedent's widow or widower, and to the decedent's dependent children or dependent next of kin.<sup>3</sup>

During the course of this survey period, the Indiana Court of Appeals rendered a number of significant decisions interpreting legislative intent and expanding the scope of recovery under Section 34-23-1-1. However, recognizing the significance and import of the court of appeals' decisions interpreting this wrongful death statute and defining and expanding the scope of recovery under the statute, the Indiana Supreme Court has accepted transfer of each of the cases, and the court of appeals' decisions have been vacated. The supreme court has yet to issue opinions on these cases. For now, the state of the law in this area remains relatively unchanged.

a. *Punitive damages.*—Traditional wrongful death law provides that pecuniary loss is the foundation of the wrongful death action. Thus, aside from the lost earnings of the decedent, Indiana courts will allow the personal representative of the decedent's estate to recover, on behalf of the decedent's beneficiaries, lost love, care and affection.<sup>4</sup> To the extent that "companionship" refers to a type of love, care and affection, the loss of "companionship" can also be recovered in a wrongful death action.<sup>5</sup> Traditionally, punitive damages were unavailable in a wrongful death action. However, in *Durham v. U-Haul International*<sup>6</sup> and *Burton v. Estate of Davis*,<sup>7</sup> the Indiana Court of Appeals recently reversed this position, and held that the damages provision in the general wrongful death statute was broad enough to allow recovery for punitive damages.<sup>8</sup> Interestingly, the *Burton* court rendered its decision after transfer had been accepted in *Durham*. The *Burton* court recognized that the supreme court had accepted transfer on *Durham* and vacated the opinion and that it could not be cited as authority. Nevertheless, the court of appeals in *Burton* noted that the thorough analysis of this issue included in the *Durham* opinion is informative and

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3. See IND. CODE § 34-23-1-1 (2000).

4. See *Andis v. Hawkins*, 489 N.E.2d 78 (Ind. Ct. App. 1986).

5. *Challenger Wrecker Mfg., Inc. v. Estate of Boundy*, 560 N.E.2d 94 (Ind. Ct. App. 1990).

6. 722 N.E.2d 355 (Ind. Ct. App.), vacated by 735 N.E.2d 233 (Ind. 2000).

7. 730 N.E.2d 800 (Ind. Ct. App.), appeal dismissed by 740 N.E.2d 850 (Ind. 2000).

8. *Durham*, 722 N.E.2d at 360; *Burton*, 730 N.E.2d at 808.



consistent with its conclusions in *Burton*.<sup>9</sup> The Indiana Supreme Court subsequently accepted transfer in *Burton*, thereby vacating the court of appeals' opinion.

Although the damages recoverable in a wrongful death action may arguably have been altered by the court of appeals' recent decisions, one thing remains constant: punitive damages cannot be awarded in a wrongful death action where the defendant is a governmental entity.<sup>10</sup>

*b. Survival of wrongful claim upon death of beneficiary.*—In *Bemenderfer v. Williams*,<sup>11</sup> the Indiana Court of Appeals held that the recovery of wrongful death damages by a decedent's estate, for the benefit of the surviving dependent beneficiary (widow or widower, dependent children or dependent next of kin), is not precluded by the death of the beneficiary during the pendency of the wrongful death action. However, the Indiana Supreme Court has accepted transfer of this case and vacated the court of appeals opinion.

*c. Independent cause of action for loss of consortium.*—In line with its holding expanding the scope of potential recovery under Indiana's Adult Wrongful Death Act, the Indiana Court of Appeals, in two decisions, held that a surviving spouse may maintain his or her own cause of action, independent of a wrongful death action brought by the personal representative of the decedent's estate, for loss of consortium, even if the decedent died instantly. Damages for such a cause of action were found to extend from the date of the decedent's death, to the date the marriage would have ended due to the death of one of the spouses.<sup>12</sup>

The ramification of the court of appeals' recent decision allowing an independent cause of action for the spouse of the decedent under a theory of loss of consortium is significant because it may potentially result in a double recovery. Damages for lost love, care and affection have been allowed under the general wrongful death statute for some time. Arguably, these could be considered similar, if not identical, to damages for loss of consortium. Previously, when consortium damages were only permitted between the time of injury and the time of death, there was a clear theoretical line between the damages apportioned between the two causes of action. Now that line is blurred. However, in *Durham*, the court did suggest that if the surviving spouse elects to pursue both the wrongful death claim and the loss of consortium claim at trial, the trial court must instruct the jury that only a single award is permissible.<sup>13</sup> Nevertheless, because the Indiana Supreme Court has accepted transfer in both *Durham* and *Bemenderfer*, the status of Indiana law remains, in effect, unchanged.

*2. Adult Wrongful Death: Non-Dependency.*—After years of debate in the

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9. See 730 N.E.2d at 808 n.9.

10. See IND. CODE § 34-13-3-4 (2000).

11. 720 N.E.2d 400 (Ind. Ct. App. 1999), vacated by 735 N.E.2d 233 (Ind. 2000).

12. See *Durham*, 722 N.E.2d at 365; *Bemenderfer v. Williams*, 720 N.E.2d 400, 408 (Ind. Ct. App. 1998).

13. See *Durham*, 722 N.E.2d at 365 n.10.



legislature, the Indiana General Assembly recently passed legislation allowing a wrongful death claim to be brought by the personal representative of the estate of an unmarried adult with no dependent children or dependent next of kin.<sup>14</sup> The statute is quite restrictive, however. First, it applies only to causes of action that accrue after December 31, 1999. Second, it specifically disallows recovery for grief, lost earnings of the decedent and punitive damages. Third, it requires that a non-dependent parent or non-dependent child who wishes to recover damages under the statute prove that the parent or child had a "genuine, substantial and ongoing relationship" with the adult person before the parent or child may recover. Finally, the statute caps pecuniary damages (loss of the adult person's love and companionship) to an aggregate of \$300,000.

In contrast to Section 34-23-1-1, this statute is relatively concise and specifically enumerates those elements of damages which are and are not recoverable. The statute has yet to be interpreted by Indiana's appellate tribunals, but decisions are certain to arise soon. Given the recent decisions by the court of appeals in the context of dependency related wrongful death actions, the new statute may serve to assist the Indiana Supreme Court in determining legislative intent, particularly with respect to punitive damages.

### *B. Child Wrongful Death Statute*

Indiana's Child Wrongful Death Act<sup>15</sup> is something of a misnomer because the Act codifies not only actions for the death of a child, but also for injury to a child. However, actions for injury to a child in the State of Indiana are typically brought under common law principles of negligence and do not necessarily raise issues under the Act. Child wrongful death actions, on the other hand, will generally always be governed by the principles set forth in the Child Wrongful Death Act.

Prior to the adoption of Indiana's Child Wrongful Death Act in 1987, recovery for the wrongful death of a child was limited to actual pecuniary loss. In 1987, the statute was amended to allow a parent to seek recovery for loss of love and companionship as a result of the wrongful death of a child. There was, however, a three-year-cap that limited non-pecuniary damages to \$100,000. That cap expired for causes of action that accrued after October 31, 1990.

Since 1987, Indiana's Child Wrongful Death Act has undergone numerous changes. In its present form, the statute attempts to identify who is a child, who may bring the action, what may be recovered and who may recover. During the course of this survey period, the Indiana legislature made no significant changes to the language of the child wrongful death statute. However, the Indiana Court of Appeals rendered two decisions interpreting the legislative intent behind the meaning of the word "child," and in one opinion affirmed the constitutionality of the Act itself.

#### *1. Interpretation of the Term "Child."—As defined by the Child Wrongful*

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14. See IND. CODE § 34-23-1-2 (2000).

15. See *id.* § 34-23-2-1.



Death Act, "child" means an unmarried individual without dependents who is less than twenty years of age, or less than twenty-three years of age and is enrolled in an institution of higher education or a vocational school.<sup>16</sup> In *Sweet v. Art Pape Transfer, Inc.*,<sup>17</sup> the parents of a twenty-one-year-old woman who was killed brought an action for recovery under the Indiana Child Wrongful Death Statute. At the time of the decedent's death, she was an employee in a vocational program and was pursuing studies in the same vocational program. However, because of her status as an employee at the school, she was not required to complete the ordinarily required paperwork for enrollment until she sought her final diploma. The court of appeals discussed the meaning of the statutory language "enrolled" and recognized the definition of "enroll" provided in *Black's Law Dictionary*: "to register; to make a record; to enter on the rolls of a court; to transcribe."<sup>18</sup> The court found that the decedent had no reason to complete a formal enrollment process because of her employment status and, thus, found that she was enrolled in the program. The court concluded that while written enrollment was absent in this case, it was both superfluous and not required by the statute.<sup>19</sup>

In *Ledbetter v. Ball Memorial Hospital*,<sup>20</sup> the Indiana Court of Appeals was faced with a similar issue. In that case, the parents of a twenty-year-old unmarried woman with no dependents who had died, brought an action under the Child Wrongful Death Statute. At the time of her death, the decedent was not enrolled in any institution of higher education or in a vocational school or program. The defendants moved for summary judgment contending that the decedent was not a child as defined by the Act because she was twenty-years-old and not enrolled in an institution of higher learning. In response, the plaintiffs contended that the decedent was a "child" for purposes of Section 34-23-2-1(a) because she had been impeded from pursuing her degree at a vocational school because of physical and mental handicaps. The plaintiffs further contended that the decedent had continually expressed an intent to return to the vocational program, but that, at the time of her death, she had not because of her alleged handicaps. The plaintiffs designated an affidavit of an instructor for Adult Basic Education in support of this contention.<sup>21</sup>

Although the court of appeals noted that it generally gave a liberal construction to the Child Wrongful Death Act, as evidenced by its decision in *Sweet*, it recognized that in this case there was no link between the decedent and a higher education program.<sup>22</sup> Despite the sympathy the court expressed for the great loss the plaintiffs had sustained as parents, it remarked that it could not in good faith stretch the meaning of the statute as far as suggested by the plaintiffs.

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16. See *id.* § 34-23-2-1(a).

17. 721 N.E.2d 311 (Ind. Ct. App. 1999).

18. *Id.* at 313 (quoting BLACK'S LAW DICTIONARY 624 (4th ed. 1968)).

19. See *id.*

20. 724 N.E.2d 1113 (Ind. Ct. App. 2000).

21. See *id.* at 1114-15.

22. See *id.* at 1116-17.



Thus, it held that "is enrolled" unambiguously means to be registered in a school or *de facto* registered.<sup>23</sup>

2. *Constitutionality*.—In addition to their arguments with respect to the interpretation of the meaning of the term "child" under the Indiana Child Wrongful Death Act, the *Ledbetter* plaintiffs also challenged the constitutionality of the Act as applied to bar their recovery for the death of their child. Specifically, the plaintiffs argued that the Act violates the privileges and immunities clause of the Indiana Constitution.<sup>24</sup>

Although the court of appeals recognized that the Child Wrongful Death Statute treats parents of children ages twenty to twenty-three and not pursuing post-secondary education differently from the parents of children in the same age bracket who are pursuing post-secondary education, it explained the rationale for such treatment as follows: "[T]he inherent characteristics of the group of 20 to 23-year old still pursuing post-secondary education include a dependence on their parents not generally shared by those who are free to hold jobs at that age."<sup>25</sup>

The court further noted that the preferential treatment is uniformly applicable and equally available to all persons similarly situated, that is to all parents of twenty to twenty-three-year-olds who are enrolled in post-secondary institutions or programs. In addition, the court observed that the court of appeals interpreted "enrolled" liberally while remaining within the clear meaning of the statute. The court concluded that because it must exercise substantial deference to legislative discretion, it is not free to conclude that a better law might have included all children under twenty-three who are, for any reason, dependent on their parents. For these reasons, the court of appeals found that the Child Wrongful Death statute does not violate the Indiana Constitution as applied to the plaintiffs' claim for damages.<sup>26</sup>

## II. WRONGFUL BIRTH AND WRONGFUL PROLONGATION OF LIFE

During the course of this survey period, the Indiana Supreme Court and the Indiana Court of Appeals had occasion to determine whether Indiana law recognizes separate causes of action for "wrongful birth" and "wrongful prolongation of life" respectively. In *Bader v. Johnson*,<sup>27</sup> the Indiana Supreme Court determined it unnecessary to characterize a plaintiffs' cause of action as "wrongful birth" because the claims alleged in the complaint were properly governed by the Indiana Medical Malpractice Act.<sup>28</sup> The supreme court noted that "wrongful birth" claims were generally described as causes of actions brought by the parents of a child born with birth defects alleging that, due to negligent medical advice or testing, they were precluded from making an

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23. *Id.* at 1117.

24. *See id.*; *see also* IND. CONST. art. I, § 23.

25. *Ledbetter*, 724 N.E.2d at 1118.

26. *See id.*

27. 732 N.E.2d 1212 (Ind. 2000).

28. *See id.* at 1216.



informed decision about whether to conceive a potentially handicapped child or, in the event of a pregnancy, to terminate it.<sup>29</sup> The court concluded that labeling the plaintiffs' cause of action as wrongful birth "adds nothing to its analysis, inspires confusion, and implies the court has adopted a new tort," which it declined to do.<sup>30</sup>

In *Estate of Taylor v. Muncie Medical Investors, L.P.*,<sup>31</sup> the estate of a former resident of the defendant healthcare institution brought a multi-count complaint against the healthcare institution that included a claim under the theory of wrongful prolongation of life. On appeal from the trial court's entry of summary judgment, the plaintiff argued that although no Indiana courts have directly addressed the issue, it is logical for Indiana to adopt a tort for wrongful prolongation of life. Specifically, the plaintiff argued that if Indiana does not do so, then there is no enforcement mechanism to protect a patient's right to refuse medical treatment and a family's right to make medical decisions for incapacitated relatives.<sup>32</sup> The court of appeals concluded, however, that creation of a new cause was unnecessary because the procedures set forth in Section 16-36-1-8 adequately protect the rights and interests of patients, their families and their healthcare providers and could have protected the rights of the decedent and the estate in this case.<sup>33</sup>

### III. MEDICAL MALPRACTICE

Once again during this survey period, the Indiana Supreme Court and Indiana Court of Appeals decided several significant cases concerning medical malpractice.

#### A. Amounts Recoverable

In *Poehlman v. Feferman*,<sup>34</sup> the Indiana Supreme Court found that, under Indiana's Medical Malpractice Act, the limitations on the amounts recoverable are limitations on damage amounts and do not include collateral litigation expenses. Additionally, the court held that each debtor is individually responsible under the Act for its own collateral litigation expenses associated with its settlement or judgment figure. Finally, the court found that the post-judgment interest statute fully applies to medical malpractice judgments.<sup>35</sup>

In *Poehlman*, the plaintiff received a judgment for \$345,263, plus court costs against Dr. Feferman. Dr. Feferman's insurance carrier paid \$103,733.09 to the county clerk to satisfy what Dr. Feferman owed pursuant to Indiana's Malpractice Act. This represented the \$100,000 the doctor owed, together with

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29. See *id.* at 1216 n.3.

30. *Id.* at 1216.

31. 727 N.E.2d 466 (Ind. Ct. App. 2000).

32. See *id.* at 470.

33. See IND. CODE §16-36-1-8 (2000).

34. 717 N.E.2d 578 (Ind. 1999).

35. See *id.* at 582-84.



post judgment interest and court costs. The plaintiff filed a petition for payment of damages from the Patient's Compensation Fund, and a declaration as to the interest liability of Dr. Feferman, his insurance carrier, and the Fund. By stipulation of the parties, \$100,000 was released from the county clerk, and the fund paid the remaining judgment of \$245,263. What remained to be resolved was the issue of post judgment interest and court costs.<sup>36</sup>

The Indiana Supreme Court disagreed with the court of appeals and held that the Act did not limit collateral financial obligations associated with litigation, such as post-judgment interest and court costs, because these arose separately by operation of law and were regulated by other statutes.<sup>37</sup> The court went one step further and addressed who was responsible for the collateral litigation expenses. The court found that each judgment debtor is individually responsible for its collateral litigation expenses even when those are added to a settlement or judgment figure and the result exceeds the Act's statutory damage limits.<sup>38</sup>

Only one month later, the Indiana Supreme Court in *Emergency Physicians of Indianapolis v. Pettit*,<sup>39</sup> issued a related ruling. In *Pettit*, the court held that a healthcare provider is responsible for prejudgment interest even if the entire amount of the judgment equals the maximum amount recoverable under Indiana's Medical Malpractice Act, thus causing the total judgment debt to exceed the cap.<sup>40</sup>

Thus, after *Poehlman* and *Pettit*, a plaintiff can recover prejudgment interest, post-judgment interest and court costs from a healthcare provider, the provider's insurer, and the fund above and beyond the statutory cap, with the exception that prejudgment interest is not recoverable by statute from the fund. These decisions give plaintiffs a little relief from Indiana's rather stringent medical malpractice damage cap. Nevertheless, in *Indiana Patient's Compensation Fund v. Wolfe*,<sup>41</sup> the court refused to expand the recovery under the Act any further, holding that a parent who has a derivative claim, based on loss of services, does not constitute a "patient" under the Act to entitle the parents to a separate statutory damage cap.<sup>42</sup>

### B. Statute of Limitations

In last year's Survey Edition, it was noted that the Indiana Supreme Court rendered several opinions concerning the constitutionality of the statute of limitations as applied to Indiana's Medical Malpractice Act.<sup>43</sup> The same is true

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36. See *id.* at 580.

37. See *id.* at 581.

38. See *id.*

39. 718 N.E.2d 753 (Ind. 1999).

40. See *id.* at 755.

41. 735 N.E.2d 1187 (Ind. Ct. App. 2000).

42. See *id.*

43. See Tammy J. Meyer & Kyle A. Lansberry, *Recent Development in Indiana Tort Law*, 33 IND. L. REV. 1545, 1592-95 (2000).



during this survey period. In *Boggs v. Tri-State Radiology, Inc.*,<sup>44</sup> the Indiana Supreme Court reaffirmed that the statute of limitations is "constitutional as applied to patients who discover the malpractice well before the expiration of the limitations period, but some time after the act of malpractice."<sup>45</sup> The court specifically did not address the situation where the discovery of the malpractice occurs on the eve of the statute of limitations. In that instance, the court left room for the possibility that such a late discovery might run afoul of the Indiana Constitution.<sup>46</sup>

The Indiana Court of Appeals was confronted with another statute of limitations situation which ran afoul of the Constitution in *Ling v. Stillwell*.<sup>47</sup> In *Ling*, the court held that even though the patient had died, it was not known until after the two year statute of limitations that the patient's death was part of a criminal investigation involving a nurse's role in suspicious deaths at the hospital. Therefore, it could not reasonably be expected that the personal representative should have discovered the death to be a result of medical malpractice.<sup>48</sup>

### C. Loss of Chance

During this survey period the Indiana Supreme Court issued three opinions concerning the issue of "loss of chance." In *Alexander v. Scheid*,<sup>49</sup> the court was confronted with four key issues surrounding an increased risk of harm and a decreased chance of long-term survival.

First, the court addressed whether a reduced chance of survival, which mathematically equates to a decrease in life expectancy is itself a compensable injury, even when the plaintiff's ultimate injury is uncertain. The court answered this in the affirmative.<sup>50</sup> Second, the court addressed how the injury should be valued. Finding that reduced life expectancy is compensated in other contexts, the court held that application of those same principles was appropriate. Therefore, the injury is valued at the reduction of the patient's expectancy from her pre-negligence expectancy.<sup>51</sup> Third, the court held that the plaintiff could maintain an action for negligent infliction of emotional distress under the modified impact rule—the impact being what the plaintiff suffered (i.e., the

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44. 730 N.E.2d 692 (Ind. 2000).

45. *Id.* at 697.

46. *See id.* at 698. It should also be noted that Justice Sullivan dissented in *Boggs* stating that if the two year statute of limitations applied to those discovering the medical malpractice at the time of the alleged malpractice or within the two year statute of limitations but did not apply to those discovering the malpractice until after the two year statute of limitations, the two year statute of limitations was unconstitutional as applied. *See id.* at 700-01 (Sullivan, J., dissenting).

47. 732 N.E.2d 1270 (Ind. Ct. App. 2000).

48. *See id.* at 1275.

49. 726 N.E.2d 272 (Ind. 2000).

50. *See id.* at 275-81.

51. *See id.* 282-83



destruction of healthy lung tissue because of the failure to diagnose). This, the court held, constituted "direct involvement."<sup>52</sup> Finally, the court found that the plaintiff could maintain a cause of action for the aggravation of her pre-existing condition.<sup>53</sup>

The Indiana Supreme Court touched on the "loss of chance" or "increased risk of harm" once again in *Cahoon v. Cummings*,<sup>54</sup> finding that the damages awarded "are to be proportional to the increased risk attributable to the defendant's negligent act or omission."<sup>55</sup> On the same day that *Cahoon* was decided, the Indiana Supreme Court issued a related opinion in *Smith v. Washington*,<sup>56</sup> holding that the measure of damages, for an act of negligence that increased the risk of an injury that was at least equally likely to occur in the absence of negligence, is to be in proportion to the increased risk attributable to the defendant's negligence.<sup>57</sup>

#### IV. NEGLIGENCE

##### A. Analyzing the Scope of the Duty of Care

1. *Mental Capacity as a Factor in the Determination of Duty.*—The issue of whether a person's mental capacity should be factored into the existence of a legal duty has been an issue that has challenged both courts and litigants for years. In 1998, in *Creasy v. Rusk*,<sup>58</sup> the Indiana Court of Appeals likened this novel issue to that involving the mental capacity of a child. In *Creasy*, Judge Kirsch, writing for the Indiana Court of Appeals, determined that Indiana has indicated a willingness to factor in an adult's mental capacity when determining whether to hold an adult person responsible for negligence. Consequently, it held that a person's mental capacity, "whether that person is a child or an adult, must be factored into the determination of whether a legal duty exists."<sup>59</sup>

In June of 2000, the Indiana Supreme Court accepted transfer in *Creasy* to examine the state of Indiana law in this area. Specifically, the court was called upon to decide the issue of whether the general duty of care imposed upon adults with mental disabilities is the same as that for adults without mental disabilities and whether the facts of the plaintiff's case were such that the general duty of care imposed upon adults with mental disabilities should be imposed upon him.<sup>60</sup>

The Indiana Supreme Court initially noted that most jurisdictions the general duty of care imposed on adults with mental disabilities is the same as that for

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52. *See id.*

53. *See id.* at 283-84.

54. 734 N.E.2d 535 (Ind. 2000).

55. *Id.* at 541.

56. 734 N.E.2d 548 (Ind. 2000).

57. *See id.* at 549-51.

58. 696 N.E.2d 442 (Ind. Ct. App. 1998), *rev'd*, 730 N.E.2d 659 (Ind. 2000).

59. *Id.* at 446.

60. *See Creasy*, 730 N.E.2d at 661.



adults without mental disabilities.<sup>61</sup> Thus, the majority of jurisdictions hold that "[a]dults with mental disabilities are held to the same standard of care as that of a reasonable person under the same circumstances without regard to the alleged tort-feasor's capacity to control or understand the consequences of his or her actions."<sup>62</sup>

This general duty of care imposed by the majority of outside jurisdictions differed significantly from that imposed by the court of appeals in *Creasy*. Specifically, the intermediate appellate court in *Creasy* found that, based on its review and analysis of judicial precedent in Indiana, that a person's mental capacity must be factored into the determination of a legal duty's existence.<sup>63</sup>

Although the Indiana Supreme Court agreed that the appellate court accurately stated Indiana law at the time of its ruling, it concluded that the law is in need of revision.<sup>64</sup> In reviewing the Restatement rule that mental capacity does not excuse a person from liability for conduct which does not conform to the standard of a reasonable manner or like circumstances, the court noted that it was founded upon general considerations of public policy.

In deciding whether Indiana should adopt this generally accepted rule, the court turned to an examination of contemporary public policy in Indiana as embodied in enactments of our state legislature.<sup>65</sup> The court then discussed Indiana legislative enactments reflecting a policy to de-institutionalize persons with disabilities and integrate them into society. Although the court recognized that contemporary public policy favors community treatment and integration, and that the Restatement rule may appear to be at odds with those policies, it balanced such considerations with those public policy reasons cited for holding individuals with mental disabilities to a standard of reasonable care in negligence claims, and ultimately rejected the court of appeal's approach in favor of the Restatement rule. Accordingly, the court held that a person with mental disabilities is generally held to the same standard of care as that of a reasonable person under the same circumstances without regard to the alleged tortfeasor's capacity to control or understand the consequences of his or her actions.<sup>66</sup>

However, in applying the Restatement rule to the facts of this particular case, the Indiana Supreme Court held that the relationship between the plaintiff and defendant, coupled with public policy concerns, dictated that the defendant owed no duty of care to the plaintiff. In so finding, the court reasoned that the plaintiff was not a member of the public at large unable to anticipate or safeguard against the harm that she encountered, but instead a caregiver of patients with Alzheimer's disease who was aware of her patients' tendency to exhibit signs of violence and combativeness. It found that the plaintiff was "employed to

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61. *See id.*

62. *Id.*

63. *See Creasy*, 696 N.E.2d at 446.

64. *See Creasy*, 730 N.E.2d at 662.

65. *See id.* at 664 (citing *Schornick v. Butler*, 185 N.E. 111, 112 (Ind. 1933)).

66. *See id.* at 666-67.



encounter, and knowingly did encounter, just the dangers which injured" her.<sup>67</sup> The court likened this situation to those under the fireman's rule. That rule provides that firemen or other public safety officials responding in emergencies are owed only the duty of abstaining from positive wrongful acts.<sup>68</sup> The court found that public safety officials and caregivers, such as the plaintiff, are similarly situated in that they are "specifically hired to encounter and combat particular dangers," and by accepting such employment assume the risk associated with their respective occupations.<sup>69</sup>

Finally, citing public policy reasons, the court stated that it would be contrary to public policy to hold the defendant owed a duty to the plaintiff when it would place "too great a burden on him because his disorientation and potential for violence is the very reason he was institutionalized and needed the aid of employed caretakers."<sup>70</sup> Accordingly, the Indiana Supreme Court affirmed the trial court's entry of summary judgment in favor of the defendant.<sup>71</sup>

The Indiana Supreme Court's decision in *Creasy* may hinder the defense of an individual who is mentally disabled by exempting evidence of such disability from the determination of the duty of care owed by that individual. However, the supreme court's apparent willingness to set forth an exception to that exemption will likely lead to further issues before our courts on this interesting facet of Indiana law in the near future.

2. *Trees and Natural Conditions*.—In *Miles v. Christensen*,<sup>72</sup> the parents of a motorcyclist who was killed when he was struck by a dead tree that had fell from the defendant landowners' rural property, brought a wrongful death action against the landowners. The tree that struck the decedent had been dead for a number of years and was visible from the perimeter of the property. The plaintiffs alleged in their complaint that the defendants were negligent in failing to maintain their real estate in a reasonably safe condition and in failing to inspect their land and correct the danger caused by the dead tree. The defendants subsequently moved for summary judgment, claiming in part that they had no duty of care to the plaintiffs' son, and thus could not have incurred liability for his death. The trial court denied the defendants' motion for summary judgment, and the defendants brought an interlocutory appeal.<sup>73</sup>

In determining what, if any, duty is owed by a landowner as to trees and other natural conditions on the land, the Indiana Court of Appeals looked to the Indiana Supreme Court's decision in *Valinet v. Eskew*,<sup>74</sup> in which the Indiana Supreme Court addressed a landowner's liability for injuries resulting from such

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67. *Id.* at 667.

68. *See id.* at 668 (citing *Heck v. Robey*, 659 N.E.2d 498, 501 (Ind. 1995); *Sands v. Wesley*, 647 N.E.2d 382, 384 (Ind. Ct. App. 1995)).

69. *Id.*

70. *Id.* at 669.

71. *See id.* at 670.

72. 724 N.E.2d 643 (Ind. Ct. App.), *trans. denied*, 735 N.E.2d 237 (Ind. 2000).

73. *See id.* at 644-45.

74. 574 N.E.2d 283 (Ind. 1991).



natural conditions. In *Valinet*, the court adopted Section 363 of the Restatement (Second) of Torts which addresses harm caused by natural conditions of land and imposes liability for harm only when that land is urban in nature.<sup>75</sup>

The defendants in *Miles*, basing their argument upon the language of the Restatement, asserted that the law does not impose a duty on the owners of rural land to remove or inspect for dead trees located adjacent to a public roadway. Observing that their land was located in a rural area and that the dead tree that fell was a natural condition of their land, the defendants argued that they were not liable for his death because they owed no duty to exercise reasonable care for the prevention of harm that a natural condition of their rural land might cause.<sup>76</sup>

While accepting the defendants' argument rested on a distinction between urban and rural land, the court of appeals found that the determination of a landowner's duty does not hinge solely upon the urban/rural distinction. First, the court found no language in *Valinet* indicating that the distinction may alone form a basis for determining whether a duty exists. Rather, *Valinet* called for a more sophisticated analysis of the duty question, requiring a consideration of factors such as traffic patterns and land use. Additionally, *Valinet* did not purport to set forth every factor that is pertinent to a determination of the landowner's duty. The court stated that although classification of land as either urban or rural may provide a useful starting point for determining a landowner's duty of care as to natural conditions, it could not conclude that *Valinet* intended the duty inquiry to consist solely of making such a classification.<sup>77</sup>

Second, the court of appeals took into account public policy considerations that weighed in favor of recognizing that a landowner may owe a duty of reasonable care as to natural land conditions that threaten outsiders. In this regard, the court observed that virtually every usable piece of property in Indiana is adjacent to a roadway or highway. As such, the court felt that sound public policy dictated that keeping roadways free from obstructions and hazards is effectuated by imposing, under certain circumstances, a duty of reasonable care as to those who, while outside of the land, suffer harm from the land's natural conditions. Thus, the court abrogated the urban/rural distinction with respect to whether a landowner owes a duty to remove decaying or dead trees located on their land so as to protect people traveling on a public highway.<sup>78</sup>

3. *Ingress and Egress*.—On the same date that the Indiana Court of Appeals rendered its decision in *Miles*, it rendered a second decision with respect to a landowner's duty of care in relation to a roadway adjacent to his or her property. In *Sizemore v. Templeton Oil Co.*,<sup>79</sup> the plaintiff fell and injured himself on a piece of asphalt at the edge of a large pothole located in the right of way when the state road adjacent to the landowner's business gave way underneath him. The plaintiff subsequently sued the landowner and town alleging that all three

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75. See *id.* at 285.

76. *Miles*, 724 N.E.2d at 646.

77. See *id.* at 646.

78. See *id.* at 646-47.

79. 724 N.E.2d 647 (Ind. Ct. App. 2000).



entities negligently caused his injuries. The trial court entered summary judgment in favor of the town and landowner, and the plaintiff subsequently appealed.<sup>80</sup>

The plaintiffs argued on appeal that the landowners' duty to provide a safe means of ingress and egress to its premises included a duty with respect to the pothole. However, the court of appeals disagreed. Specifically, the court of appeals found no precedent standing for the proposition that a duty to provide safe ingress and egress to a commercial property extends to a duty with regard to the condition of the adjacent highway right-of-way when that condition was not created by or related to a defendant's use of his own property. On the contrary, the court noted that current Indiana law indicates the opposite result.<sup>81</sup>

### B. Comparative Fault Act

The Indiana Comparative Fault Act<sup>82</sup> applies generally to damages actions based on fault that occurred on or after January 1, 1985. The primary objective of the Act was to modify the common law rule of contributory negligence under which a plaintiff was barred from recovery where he or she was only slightly negligent.<sup>83</sup> The Act seeks to achieve this result through proportional allocations of fault, in showing that each person at fault contributed to cause injury bears his or her proportionate share of the total fault contributing to the injury.<sup>84</sup> Since its inception, the Indiana Comparative Fault Act has been the subject of numerous court decisions analyzing its scope and interpreting its provisions. During this survey period, Indiana courts rendered a number of decisions clarifying the intent of the legislature and interpreting the Act in relation to fundamental principals of common law and public policy considerations.

1. *Credits/Set-offs.*—In *Mendenhall v. Skinner & Broadbent Co.*,<sup>85</sup> the Indiana Supreme Court addressed the issue of whether a defendant who suffers judgment in a tort case is entitled to credit for money paid by a settling co-defendant who has not been added back under the non party provisions of the Comparative Fault Act. The supreme court held that the party suffering the judgment is not so entitled.<sup>86</sup>

Indiana courts have traditionally followed the one satisfaction principal, which holds that a court should recognize settlement agreements and credit the funds received by the plaintiff towards the judgment against a co-defendant. The

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80. See *id.* at 649.

81. *Id.* at 653 (citing *State v. Flanigan*, 489 N.E.2d 1216, 1217 (Ind. Ct. App. 1996) (holding that the owner of commercial premises adjacent to a public highway has no duty to a patron who was injured when struck by an automobile as that patron was crossing or walking along such highway)).

82. IND. CODE § 34-51-2-1 (2000).

83. See *IPALCO v. Brad Snodgrass, Inc.*, 578 N.E.2d 669 (Ind. 1991).

84. See *Bowles v. Tatom*, 546 N.E.2d 1188 (Ind. 1989).

85. 728 N.E.2d 140 (Ind. 2000).

86. See *id.* at 145.



principal behind this credit is that the injured party is entitled to only one satisfaction for a single injury and the payment by one joint tortfeasor inures to the benefit of all.<sup>87</sup> This policy was articulated long before enactment of the Comparative Fault Act, and in *Mendenhall* the supreme court was faced with the task of determining whether the Act necessitates change in this common law practice.<sup>88</sup>

The plaintiffs argued that the amounts received in settlement did not survive the Comparative Fault Act and that the Act makes the non-party defense the defendants' sole method for reducing liability when another party settles. Conversely, the defendants maintained that credits or set-offs did survive the Act. The court recognized the absence of controlling precedent and based its decision in *Mendenhall* on public policy considerations. As could be anticipated, each of the parties urged differing public policy concerns in their determination of whether credits survived the Comparative Fault Act. The plaintiffs asserted that the court should consider the risks that a plaintiff incurs when settling and argued that, depending on the accuracy of a plaintiff's predictions about the amount of damages a jury may find, or the percentage of fault that the jury will assign to the settling defendant, a plaintiff may suffer a penalty or gain a windfall. On the other hand, the defendants argued that if non-settling defendants did not receive credits, plaintiffs would be unjustly enriched if they both receive a favorable verdict and receive partial or full recovery from settling co-defendants.<sup>89</sup>

After discussing the potential for double recovery under our system of comparative fault, the supreme court found that the ability of courts to implement the common law policy of credit under the Comparative Fault Act is best served by a rule that obliges defendants to name the settling non-party if they are to seek credit for settlement.<sup>90</sup> The supreme court concluded that "the one satisfaction rule and the benefits of settlement are best advanced to affording litigating defendants a credit where a thorough allocation of damages by the jury provides the court with a respectable basis upon which to adjust a judgment to avoid a double credit."<sup>91</sup> Thus, it held that to request a credit, the litigating defendant must add the settling defendant as a non-party under the Comparative Fault Act. In light of the fact that the defendant had not named the settling co-defendant as a non-party for purposes of comparative fault allocation, the court determined that the defendant was not entitled to receive a credit for the amount of the plaintiff's settlement with the co-defendant.<sup>92</sup>

For practicing attorneys, the import of the supreme court's ruling in *Mendenhall* is clear. If you intend to seek a credit for the amount for which a plaintiff has settled with a co-defendant, you must name that individual or entity as a non-party defendant for purposes of comparative fault allocation.

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87. *See id.* at 141.

88. *See id.*

89. *See id.* at 143.

90. *See id.* at 144.

91. *Id.* at 145.

92. *See id.*



2. *Non-Party Defense*.—The issue of whether one defendant may assert a challenge to a summary judgment ruling that operates to dismiss another defendant from a case under the Indiana Comparative Fault Act was addressed by the court of appeals in *U-Haul International, Inc. v. Nulls Machine & Manufacturing Shop*.<sup>93</sup> In *U-Haul*, the defendant was sued by the estate of a driver killed in an automobile accident caused by the defendant's driver. Investigation by the defendants led to a determination that alleged manufacturing defects in certain valves may have been a cause for the accident. U-Haul named the manufacturer of the valves as a non-party defendant for purposes of comparative fault allocation, and the plaintiffs subsequently amended their complaint and brought a products liability action against each of the valve manufacturers. The valve manufacturers filed motions for summary judgment that were opposed by U-Haul. Ultimately, the trial court granted summary judgment in favor of the valve manufacturers and against the plaintiffs. U-Haul filed a motion to correct error challenging the ruling, which was denied by the trial court. U-Haul subsequently appealed the decision.<sup>94</sup>

On appeal, the valve manufacturers contended that U-Haul lacked standing to challenge a grant of summary judgment in their favor. To challenge the dismissal of the valve defendants, the court noted that U-Haul must demonstrate that it had a stake in the outcome of the ruling.<sup>95</sup> To demonstrate a personal stake, a party must prove that it is in immediate danger of sustaining a direct injury as the result of the conduct at issue.<sup>96</sup> Generally, a "defendant does not have standing to appeal a judgment rendered in favor of a co-defendant unless the defendant suffered some prejudice as a result of the entry of judgment in favor of the co-defendant."<sup>97</sup> Thus, the court determined that for U-Haul to have standing, it must demonstrate that it was prejudiced by the valve manufacturers' summary dismissal from the case.

U-Haul contended that it was prejudiced by the summary dismissal because of the application of Indiana's Comparative Fault Act. Specifically, it argued that having been dismissed from the action, the valve manufacturers could not be named as non-parties and any fault the jury would have allocated to them would be allocated instead to U-Haul. As a result, U-Haul contended it was prejudiced by the valve manufacturers summary dismissal because it exposed it to a chance of greater liability for damages resulting from the accident.<sup>98</sup>

The Indiana Court of Appeals noted that this was a case of first impression. After examining rulings from courts in other jurisdictions, the court of appeals determined that two approaches could govern the determination of this issue.<sup>99</sup>

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93. 736 N.E.2d 271 (Ind. Ct. App. 2000).

94. *See id.* at 273-74.

95. *Id.* at 275 (citing *Shand Mining, Inc. v. Clay County Bd. of Comm'rs.*, 671 N.E.2d 477 (Ind. Ct. App. 1996)).

96. *See id.*

97. *Id.* at 279.

98. *See id.* at 275.

99. *See id.* at 275-78.



Under the first analysis, a remaining co-defendant would have standing to challenge the dismissal of a co-defendant via summary judgment so long as the remaining co-defendant can demonstrate that the dismissal of the co-defendant negatively impacted the complaining party's interest in the litigation.<sup>100</sup> Under the second analysis, before considering the nature of the complaining co-defendants interest, the court must determine whether that party preserved the issue of standing.<sup>101</sup> The court next examined Indiana law with an eye toward which of the two approaches is more compatible with that taken by Indiana courts in similar circumstances. The court determined that in Indiana a defendant must demonstrate that it has a stake in the outcome and will potentially suffer prejudice as a result of a co-defendant's dismissal. Because the dismissal of a co-defendant from a case subjects a remaining defendant to greater potential liability under the Comparative Fault Act, the court agreed with those courts that determined that this is sufficient to confer standing upon a co-defendant to appeal such a ruling.<sup>102</sup>

The court of appeals noted, however, that the remaining co-defendant must also preserve the error at the trial court level. Because U-Haul opposed the valve manufacturer's motions for summary judgment in the trial court by filing a brief in opposition to the motion and by filing a motion to correct error following the ruling, it concluded that U-Haul had standing to appeal summary judgment in favor of the valve manufacturers.<sup>103</sup>

3. *Municipality Initiating Suit.*—In *Warrick County v. Waste Management of Evansville*,<sup>104</sup> Warrick County filed suit against a waste management company and its driver alleging that the driver negligently operated a heavy truck and damaged a county bridge. The defendants moved for summary judgment on the basis that the county did not suffer damages as a result of their alleged negligence. Specifically, they argued that the bridge that was destroyed by the garbage truck had no value and that, because it needed to be replaced, the county did not suffer any damages when it was required to re-route traffic and replace the bridge. The trial court granted summary judgment in favor of the defendants.<sup>105</sup>

On appeal, the county argued that the Indiana Comparative Fault Act is not applicable to the present cause of action due to the "governmental entities and public employee exception." This provision makes the Act inapplicable to tort claims against governmental entities or public employees under Indiana's Tort Claims Act.<sup>106</sup> The court of appeals disagreed. Although the court recognized that there are inequalities occasioned by the application of the governmental

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100. See, e.g., *Hammond v. N. Am. Asbestos Corp.*, 565 N.E.2d 1343 (Ill. App. Ct. 1991); *Koller v. Liberty Mut. Ins. Co.*, 546 N.W.2d 799 (Wis. Ct. App. 1994).

101. See, e.g., *Tinker v. Kent Gypsum Supply, Inc.*, 977 P.2d 627 (Wash. Ct. App. 1999).

102. See *id.* at 280.

103. See *id.*

104. 732 N.E.2d 1255 (Ind. Ct. App. 2000).

105. See *id.* at 1257-58.

106. IND. CODE § 34-51-2-2 (2000).



entity exception contained in the Comparative Fault Act, it stated that the legislature accepted the applicability of the Act only for those cases against governmental entities under the Tort Claims Act.<sup>107</sup> Thus, the court found that exception to Indiana's Comparative Fault Act has no application to the situation at hand where the governmental entity has sued a private entity.<sup>108</sup>

As to the issue of damages, the court noted that the issue concerning the proper measure of damages when a bridge is damaged is a question of first impression in Indiana. It further noted that determination of this issue is further complicated because the cost of the replacement bridge will reflect the cost of modern design with maximum load capacity and safety features that were not present in the damaged bridge. After analyzing rulings of other jurisdictions on this issue, the court concluded that:

when a bridge must be replaced as a result of the negligent acts of another, the governmental entity is injured to the extent of the value of the bridge, when considering such factors as the original cost, the age of the property, its use and utility from both economic and social viewpoint, its condition, and the cost of restoration or replacement.<sup>109</sup>

### C. Mitigation of Damages

In *Medlock v. Blockwell*,<sup>110</sup> the Indiana Court of Appeals attempted to clarify the issue of a injured party's duty to mitigate his or her damages. The plaintiffs brought suit against the defendant for personal injuries as the result of an automobile accident. Following the accident the plaintiffs were taken to a local emergency room where they were treated for their injuries. However, after the accident they failed to seek and follow through with recommended medical treatment. The evidence also established that the couple resumed their normal activities.<sup>111</sup>

Following a jury verdict in favor of the plaintiffs where they were assigned forty-nine percent comparative fault, the plaintiffs filed a motion to correct error and a motion for a new trial, both of which were denied by the trial court. On appeal, the plaintiffs claimed that the jury verdict finding them forty-nine percent at fault was clearly erroneous and could only have been reached as a result of confusion, inattention, corruption, passion or prejudice. The defendant argued that the jury properly applied the law instructed with respect to mitigation of damages and fault, and contended that the plaintiffs' failure to minimize their injuries and to avoid aggravating their injuries made them at fault for their damages. The court of appeals agreed with the defendant.<sup>112</sup>

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107. See *Waste Mgmt.*, 732 N.E.2d at 1261; IND. CODE § 34-51-2-2 (2000).

108. See *Waste Mgmt.*, 732 N.E.2d at 1261.

109. *Id.* at 1260.

110. 724 N.E.2d 1135 (Ind. Ct. App. 2000).

111. See *id.* at 1136.

112. See *id.* at 1137.



In its jury instruction defining the element of fault, the trial court instructed the jury that the doctrine of mitigation of damages imposes a duty on an injured party to exercise reasonable diligence and ordinary care in attempting to minimize his or her damages or avoid aggravating his or her injury. The trial court further instructed the jury that the injured party is required to use the same care and diligence as a person of ordinary prudence under like circumstances. The trial court went on to instruct the jury on fault allocation under Indiana's Comparative Fault Act, which defines "fault" as including an "unreasonable failure to . . . mitigate damages."<sup>113</sup> On appeal, the plaintiffs relied upon the court of appeals' holding in *Deible v. Poole*,<sup>114</sup> to support their claim that the verdict was against the weight of the evidence. In *Deible*, the plaintiff was stopped at a traffic light when the defendant's car struck her car from behind. The defendant admitted that he was responsible for the collision at trial and the plaintiff was entitled to some damages, yet maintained that the plaintiff had failed to mitigate her damages. On appeal, the *Deible* court held that the failure to mitigate damages is a defense to the amount of damages the plaintiff is entitled to recover once a defendant has been found to have caused injury, but it is not a defense to the ultimate issue of liability.<sup>115</sup>

In *Medlock*, the court explained that *Deible* was limited to the unique situation where a defendant admits liability for a tort and admits that the plaintiff is entitled to recovery. It went on to state that this case is distinguishable from *Deible* in that the jury's verdict did not go to the ultimate issue of liability. The court noted that the Indiana General Assembly decided that, under our comparative fault system, "fault" includes a failure to mitigate damages. While the court stated that it believed that the better policy would be to treat mitigation of damages as a damage issue rather than a fault allocation issue, it recognized that the legislature has rejected this approach.<sup>116</sup>

It appears evident from the *Medlock* decision that the panel of the court did not agree with the Legislature's mandate that failure to mitigate damages be treated as a fault allocation issue. However, the court did not seem overly troubled by the legislative mandate, finding that in cases such as this, where there is evidence of a failure to mitigate damages, the end product of the damage calculation remains the same.<sup>117</sup>

#### *D. Loss of Opportunity*

Federal courts in Indiana are often called upon to render opinions interpreting Indiana law on issues that remain unresolved by either the Indiana Supreme Court or its appellate courts. During the course of this survey period, the District Court for the Southern District of Indiana was called upon to do just

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113. *Id.* (quoting IND. CODE § 34-6-2-45 (2000)).

114. 691 N.E.2d 1313 (Ind. Ct. App. 1998), *aff'd*, 702 N.E.2d 1076 (Ind. 1998).

115. *See id.* at 1316.

116. *See id.* at 1138.

117. *See id.*



this in the context of the lost chance doctrine.

In *Wright v. St. Mary's Medical Center of Evansville, Inc.*,<sup>118</sup> a patient sued the defendant hospital that had removed the patient's malfunctioning artificial heart valve but failed to preserve it for her use. The plaintiff had requested that the hospital hold the valve so that it could be evaluated by an independent laboratory to determine whether its condition qualified the plaintiff for benefits under a settlement agreement reached with the valve manufacturer pursuant to a class action lawsuit. Unfortunately, the hospital lost the valve and was unable to give it to the plaintiff, who then filed a complaint against the hospital for having negligently lost her heart valve.<sup>119</sup>

The district court began its analysis of whether the plaintiff was entitled to damages for loss of the opportunity to recover under the settlement agreement by noting that the plaintiff's claim raises the issue of whether the court should apply the much-debated "loss of a chance" doctrine. The court explained that:

[t]raditional causation principles utilize an *ex post* test which requires courts to contemplate what would have probably happened "but for" the defendant's breach of contract or breach of duty and tort. The "loss of chance" doctrine, by contrast, is based upon the value of an opportunity itself determined *ex ante*.<sup>120</sup>

The court noted that some courts review chances as interests for the protection in their own right, while others have rejected the theory.<sup>121</sup>

The district court recognized that the issue of whether the loss of a chance is compensable in Indiana has only been addressed in the medical malpractice context. In *Mayhue v. Sparkman*,<sup>122</sup> the Indiana Supreme Court rejected the loss of chance doctrine in the medical malpractice setting in favor of the "Restatement approach," which "does not recognize chances of being worthy of protection in their own right."<sup>123</sup> Given that the Indiana Supreme Court rejected the loss of chance doctrine in the medical malpractice setting, the District Court for the Southern District of Indiana determined that it was unlikely that they would recognize it in the case at hand. First, the court found that the supreme court's conclusion in *Mayhue* indicated a reluctance to carve out a new doctrine of recovery for plaintiffs in this area.<sup>124</sup> Second, the court found that recognition of a loss of chance doctrine is more compelling where the law is compensating the loss of a chance at life, rather than a loss of a chance at, as here, some purely economic gain. The court concluded that "[b]ecause Indiana law has not recognized the loss of an opportunity as damages in a negligence or breach of contract action, and because the Indiana Supreme Court has explicitly rejected

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118. 59 F. Supp.2d 794 (S.D. Ind. 1999).

119. *See id.* at 796-98.

120. *Id.* at 801.

121. *See id.*

122. 653 N.E.2d 1384 (Ind. 1995).

123. *Id.* at 1388.

124. *See Wright*, 59 F. Supp.2d at 801.



the doctrine in medical malpractice situations . . . the doctrine is unavailable in Indiana."<sup>125</sup>

The district court's opinion in *Wright*, although not a conclusive statement of Indiana law, is highly persuasive authority for an argument that the loss of chance doctrine will not be applicable in negligence cases brought in Indiana. However, until the Indiana Court of Appeals or Indiana Supreme Court speaks to this issue, the opportunity for a loss of chance cause of action remains. Nevertheless, practicing attorneys should be cautious to bring such an action unless the circumstances of the particular case rise to a level that may influence a state court to disagree with the findings of the Federal District Court in *Wright*, and distinguish the Indiana Supreme Court's holding in *Mayhue*.

#### V. STATUTE OF LIMITATIONS DEFENSE—FRAUDULENT CONCEALMENT

In *Doe v. Shults-Lewis Child & Family Services, Inc.*,<sup>126</sup> the Indiana Supreme Court clarified issues concerning the Statute of Limitations when an adult plaintiff asserts a claim for tortious conduct committed against him or her as a child and brings an action beyond the statute of limitations against a defendant who is not a parent. In *Shults-Lewis*, two women who had been foster children at the Shults-Lewis home sued the home for repeated sexual abuse suffered at the hands of one of the home's employees. Both women left the home in the late 1960s and did not bring suit until 1990, well into adulthood. Plaintiff Jane F. did not bring suit until 1990 because, until then, she did not realize the connection between the abuse and her psychological distress. Plaintiff Jane I., however, did not bring suit until 1990 because she did not remember anything regarding the abuse until that year, after having had several conversations with Jane F. and other members of the group home about the abuse.<sup>127</sup> The defendant subsequently filed a motion for summary judgment, arguing that the plaintiffs' claims were time barred, and the trial court entered judgment in the defendant's favor.

On appeal, the court of appeals reversed the trial court's entry of summary judgment in favor of the defendant as to plaintiff Jane I. only, finding that fraudulent concealment had been sufficiently invoked by Jane I. The Indiana Supreme Court subsequently granted transfer to address the circumstances in which a plaintiff could bring a claim of childhood sexual abuse against a non-parent outside of the statute of limitations.<sup>128</sup>

The supreme court began its analysis by noting that fraudulent concealment is an equitable doctrine that "operates to estop a defendant from asserting the statute of limitations as a bar to a claim whenever the defendant, by his or her own actions, prevents the plaintiff from obtaining the knowledge necessary to

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125. *Id.* at 803.

126. 718 N.E.2d 738 (Ind. 1999).

127. *See id.* at 742-43.

128. *Id.*



pursue a claim.”<sup>129</sup> The court then went through a lengthy analysis of its prior decision in *Fager v. Hundt*,<sup>130</sup> where it addressed those circumstances in which a plaintiff could bring a claim of childhood sexual abuse against a parent outside of the statute of limitations.<sup>131</sup> In *Fager*, the supreme court held that the doctrine of fraudulent concealment “should be available to the plaintiff to estop a defendant from asserting the statute of limitations ‘when he has, either by deception or by a violation of duty, concealed from the plaintiff material facts thereby preventing the plaintiff from discovering a potential cause of action.’”<sup>132</sup> The *Fager* court concluded that when this occurs, equity will toll the statute of limitations until the equitable grounds cease to operate as a reason for delay.<sup>133</sup>

Specifically, the *Fager* court’s framework for analysis provided that where an adult plaintiff alleges that a parent engaged in tortuous conduct against the plaintiff as a child, the plaintiff has the burden of establishing that the parent engaged in intentional felonious conduct and must invoke the equitable doctrine by pointing to facts “showing that her lack of memory resulted from a concealment caused by the defendant’s deception or breach of duty.”<sup>134</sup> The equitable grounds cease as a reason for delay when that “person, once becoming an adult, knows or should have discovered that a childhood injury was sustained as a result of the defendant’s tortuous conduct.”<sup>135</sup> The *Fager* court concluded that a plaintiff claiming that repressed memory caused the delay in filing suit against his or her parent must show that the defendant’s breach of duty or wrongful conduct caused them to repress the memory of the intentional felonious conduct. The plaintiff must also show that the claim was brought within a reasonable amount of time after the memories were recovered.<sup>136</sup>

Although the Supreme Court cited its previous holding in *Fager* with approval, it distinguished the present case, finding that the defendant served as plaintiffs’ foster care parents/guardians and not their adoptive or biological parents. After analyzing Indiana law with respect to guardianship of minors, the court concluded that when an adult plaintiff asserts a claim for tortuous conduct committed against him or her as a child, and brings an action beyond the statute of limitations against the defendant who is not a parent, the plaintiff is required to:

- (1) show his or her parent(s) did not know of the tortuous conduct, or the parent(s) knew of the tortuous conduct and colluded to conceal the tortuous conduct; (2) prove the tortious act alleged; (3) show that the defendant, through his own actions, breached a duty to inform or

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129. *Id.* at 744 (citing *Fager v. Hundt*, 610 N.E.2d 246 (Ind. 1993)).

130. 610 N.E.2d at 246.

131. *See Doe*, 718 N.E.2d at 744-45.

132. *Fager*, 610 N.E.2d at 251.

133. *See id.*

134. *Id.* at 252.

135. *Id.* at 251.

136. *See id.* at 251-52.



engaged in wrongful conduct which prevented the plaintiff from discovering the cause of action within the statutory period; (4) provide expert opinion evidence which supports the validity of the phenomenon of repressed memory and opines that plaintiff actually repressed memory of the abuse; and (5) show that the plaintiff exercised due diligence in commencing her action after the equitable grounds ceased to operate (i.e., recovered her memories), and therefore brought the claim within a reasonable time after recovering memories of the events.<sup>137</sup>

Applying this standard to the plaintiffs' claims, the court held that Jane F.'s claims were barred because: "where the plaintiff actually retains memories of the events, there is nothing to cause the delay of the commencement of the cause of action. There was nothing to prevent [Jane F.] from bringing the claim when her legal disability ended at age 18."<sup>138</sup> In contrast, Jane I.'s claims were not time-barred because she had no memory of the events that presented sufficient acts to invoke the equitable doctrine of fraudulent concealment, which tolled the statute of limitations.<sup>139</sup>

## VI. EMOTIONAL DISTRESS

In last year's Survey Edition, *Groves v. Taylor*,<sup>140</sup> was addressed since the case refused to expand Indiana's impact rule.<sup>141</sup> Rather, the Indiana Court of Appeals in *Groves* invited the Indiana Supreme Court to modify and expand Indiana law concerning the impact rule and claims for emotional distress.<sup>142</sup> During this survey period, the Indiana Supreme Court accepted the court of appeals' invitation, granted transfer, vacated the trial court judgment and the court of appeal's opinion, and remanded the case to the trial court. The Indiana Supreme Court held that where the direct impact test is not met, a bystander may establish "direct involvement" by proving that the plaintiff witnessed or came on the scene soon after the death or severe injury of a loved one.<sup>143</sup>

One further expansion of the tort of emotional distress may be on the horizon as predicted by the United States District Court for the Northern District of Indiana in *Patel v. United Fire & Casualty Co.*<sup>144</sup> In *Patel*, the district court predicted that Indiana law would permit an insured injured by the bad faith conduct of an insurer is entitled to recover damages based upon traditional tort principles of compensation for resultant injuries actually suffered, including emotional distress.<sup>145</sup> Should Indiana appellate courts adopt such a position, this

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137. *Shults-Lewis*, 718 N.E.2d at 746 (citations omitted).

138. *Id.* at 747 n.3.

139. *See id.* at 748.

140. 711 N.E.2d 861 (Ind. Ct. App. 1999), *vacated by* 729 N.E.2d 569 (Ind. 2000).

141. *See Meyer & Lansberry, supra* note 43, at 1572.

142. *See* 711 N.E.2d at 864.

143. *See* 729 N.E.2d at 569.

144. 80 F. Supp. 2d 948 (N.D. Ind. 2000).

145. *See id.* at 958.



could have a significant impact upon the law of bad faith in Indiana.

## VII. MALICIOUS PROSECUTION

In a case of first impression, the Indiana Court of Appeals held in *City of New Haven v. Reichhart*,<sup>146</sup> that where a qualified petitioner brings a legitimate claim against a governmental entity in the manner prescribed by law, that entity is prohibited from pursuing a malicious prosecution claim against the petitioner regardless of the petitioner's motivation in bringing the petition.<sup>147</sup>

The court found that the United States Supreme Court's treatment of "sham" litigation under the Sherman Anti-Trust Act was instructive.<sup>148</sup> The court of appeals noted that the Supreme Court has repeatedly found that evidence of anti-competitive intent or purpose alone does not transform otherwise legitimate activity into a sham. Similarly, the court of appeals pointed out that pursuant to the National Labor Relations Act, even an improperly motivated lawsuit could not be enjoined as an unfair labor practice unless such litigation is baseless.<sup>149</sup>

In conclusion, the court of appeals held that the First Amendment protects a citizen's right of petition regardless of merit. So, when a qualified petitioner brings a legitimate claim against a governmental entity in the manner prescribed by law, that entity cannot pursue a malicious prosecution claim regardless of the motivation behind the institution of the claim.<sup>150</sup>

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146. 729 N.E.2d 600 (Ind. Ct. App. 2000).

147. *See id.* at 606.

148. *See id.* (citing *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 58 (1993)).

149. *See id.*

150. *See id.*



# **SURVEY OF RECENT DEVELOPMENTS OF THE LAW CONCERNING THE UNIFORM COMMERCIAL CODE AND A BRIEF INTRODUCTION TO REVISED UCC ARTICLE 9**

JUDY L. WOODS\*

## **INTRODUCTION**

In 2000, there were no Indiana Supreme Court cases addressing the Uniform Commercial Code (UCC). Indiana Court of Appeals' decisions addressed the applicability of the UCC in the context of products liability litigation<sup>1</sup> and contracts for both the sale of goods and related services.<sup>2</sup> Three other decisions of the court of appeals addressed issues concerning the statute of limitations,<sup>3</sup> stop payment orders for checks,<sup>4</sup> and notice requirements for the sale of collateral.<sup>5</sup> None of these cases represents a significant change or development in Indiana law. Rather, these cases clarify the law and offer helpful points for those engaged in commerce, as well as lawyers and judges applying the law.

However, Article 9 of the UCC has been completely redrafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL). Effective July 1, 2001, revised Article 9, Indiana Code section 26-1-9.1 will replace Indiana Code section 26-1-9.<sup>6</sup> NCCUSL indicated that as many states as possible should enact revised Article 9 effective on July 1, 2001 to minimize confusion and promote uniformity among the states. Currently, about twenty-eight states and the District of Columbia have enacted revised Article 9, with an additional eighteen states and the U.S. Virgin-Islands considering it.<sup>7</sup> Notably,

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1. See, e.g., *Hitachi Constr. Mach. Co., Ltd. v. Amax Coal Co.*, 737 N.E.2d 460 (Ind. Ct. App. 2000).

2. See *Dow Chem. Co. v. Ebling*, 723 N.E.2d 881 (Ind. Ct. App.), *trans. granted*, 741 N.E.2d 1249 (Ind. 2000).

3. See *Troyer v. Cowles Products Co.*, 732 N.E.2d 246 (Ind. Ct. App. 2000).

4. See *Gallant Ins. Co. v. Amaizo Fed. Credit Union*, 726 N.E.2d 860 (Ind. Ct. App. 2000).

5. *Walker v. McTague*, 737 N.E.2d 404 (Ind. Ct. App. 2000).

6. Pub. L. No. 57, § 45 (2000).

7. For an updated list of those states that have enacted or are considering enactment of revised Article 9, see <http://www.nccusl.org/uniformact-factsheets/uniformacts-fs-ucca9.htm> (NCCUSL website). The following states have adopted revised Article 9: Alaska, Arizona, California, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, North Carolina, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and West Virginia. See *id.* These states are currently considering enactment of revised Article 9: Alabama, Arkansas, Colorado, Connecticut, Georgia, Idaho, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Wisconsin, and Wyoming. See *id.*



neither Ohio, where many of Indiana's banks are headquartered, nor New York have adopted revised Article 9.

In addition to revising Article 9, the Indiana legislature made numerous conforming amendments and changes to other portions of Indiana's UCC and to other provisions of Indiana law. This Article will highlight some of the more significant aspects of the revisions to Article 9 and the implications for Indiana practitioners. Obviously, Indiana courts have not yet construed revised Article 9. Thus, next year is likely to be a confusing time for businesses, consumers, and for those who represent them in transactions involving secured transactions and relegated litigation. Indiana attorneys are urged to follow the developments in other states that have adopted revised Article 9 for guidance on how Indiana courts may view the new law.

In addition, the official comments to revised Article 9 offer substantial guidance in applying and interpreting the UCC.<sup>8</sup> As with the original version of Article 9, Indiana has not adopted the official comments as part of its statutory enactment of the UCC. In the past, Indiana courts have nevertheless looked to the language of the official comments for assistance in construing the statute<sup>9</sup> and are expected to continue to do so.

## I. APPLICABILITY OF THE UCC

### A. *Interplay Between the Products Liability Act and the UCC*

In the past year, two Indiana Court of Appeals cases involving products liability and other claims raised issues concerning the applicability of the UCC. In *Hitachi Construction Machinery Co. v. Amax Coal Co.*,<sup>10</sup> Amax purchased a \$2.6 million excavator from Hitachi for use in its mining operations. At Amax's request, the excavator was specially equipped with a fire suppression system. After a fire broke out on the excavator, the fire suppression system was activated, but it failed to extinguish the fire. The fire caused extensive damage to the excavator and was alleged to have been caused by defects in the design of the excavator. Hitachi moved to dismiss Amax's complaint on the ground that it failed to state a claim for relief under Indiana's Products Liability Act<sup>11</sup> and also moved for judgment on the evidence. Hitachi's motions were predicated on the fact that the damage to the excavator was damage to the product itself, and not damage to other property that is "wholly outside and apart from the product

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8. Official comment 1 to revised Article 9, section 101 explains that the comments to the revision do not provide as much historic background as did the comments to the 1972 and earlier versions of Article 9. See U.C.C. § 9-101 cmt. 1 (Rev. 1999). However, these comments are helpful in describing the changes and new material in revised Article 9.

9. See, e.g., *HCC Credit Corp. v. Springs Valley Bank & Trust*, 712 N.E.2d 952, 954 (Ind. 1999).

10. 737 N.E.2d 460 (Ind. Ct. App. 2000).

11. IND. CODE § 34-20-2-1 (1999).



itself.”<sup>12</sup> Hitachi’s motions were denied, and the case proceeded to trial, resulting in a damage award of a little over \$2 million.<sup>13</sup>

The court of appeals finding that the evidence did not show that the fire suppression system was “other property” concluding that the Products Liability Act distinguishes between “product” and “property” and “contemplates the defective product acting on some other property causing some harm to it.”<sup>14</sup> Therefore, Amax’s product liability claim for damages failed as a matter of law.<sup>15</sup>

At trial, Amax attempted to assert an alternative theory of liability based on a breach of implied warranties under Article 2 of the UCC. The trial court refused to instruct the jury on that alternative theory because it believed that Amax’s claim for breach of the implied warranties of merchantability and fitness for ordinary and customary uses were subsumed under the products liability claims. The court of appeals disagreed and explained that “[a]ctions brought under the [Products Liability] Act and the Uniform Commercial Code ‘represent two different causes of action . . . . [T]he Product Liability Act governs product liability actions in which the theory of liability is negligence or strict liability in tort, while the UCC governs contract cases which are based on breach of warranty.’”<sup>16</sup> The UCC and Products Liability Act represent two separate causes of action and provide for alternative remedies. “[T]he adoption of the Products Liability Act did not vitiate the provisions of the UCC.”<sup>17</sup> The court of appeals emphasized that actions for breach of implied warranties under Article 2 of the UCC “sound[] in contract, and may not be considered an allegation of negligence or strict liability in tort.”<sup>18</sup> Because Amax was precluded from presenting its breach of warranty claims to the jury, the case was remanded to the trial court for further proceedings.<sup>19</sup>

This case follows other Indiana cases maintaining a bright line between causes of action sounding in tort and contract.<sup>20</sup> This case is also an important reminder of the need to plead alternative theories for relief. In a case such as this, where the product at issue had been modified, but it could not be shown that the modification was other property and not part of the excavator for purposes of the Products Liability Act, the UCC provided the only possibility of recovery for the loss. Such is commonly the case when specially manufactured or modified goods are involved.

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12. 737 N.E.2d at 463.

13. *See id.* at 462-64.

14. *Id.* at 464 (quoting *Interstate Cold Storage v. Gen. Motors Corp.*, 730 N.E.2d 727, 730 (Ind. Ct. App. 1999)).

15. *See id.* at 465.

16. *Id.* (quoting *B&B Paint Corp. v. Schrock Mfg., Inc.*, 568 N.E.2d 1017, 1020 (Ind. Ct. App. 1991)).

17. *Id.* (quoting *B&B Paint Corp.*, 568 N.E.2d at 1020).

18. *Id.*

19. *See id.* at 466.

20. *Miller Brewing Co. v. Best Beers*, 608 N.E.2d 975, 984 (Ind. 1993).



In *Dow Chemical Co. v. Ebling*,<sup>21</sup> the court of appeals applied the "predominate thrust test" for determining whether a transaction is a transaction in goods and therefore governed by the UCC. The predominate thrust test was adopted by the Indiana Supreme Court in *Insul-Mark Midwest, Inc. v. Modern Materials, Inc.*<sup>22</sup> The test is used to determine "whether the transactions predominant factor, [its] thrust, [its] purpose, reasonably stated, is the rendition of service, with goods incidentally involved . . . or is a transaction of sale [of goods], with labor incidentally involved."<sup>23</sup> The test applies four factors: (1) the words and terms used by the parties to describe their relationship and the performance to be rendered under the contract; (2) the circumstances of the parties and their primary purpose for the contract; (3) the final product for which the purchaser bargained and whether that product may best be described as goods or service; and (4) the costs for the goods and services provided and whether the price is based on goods or service or both.<sup>24</sup> The court of appeals applied all four factors to the purchase of pesticides and a service program to identify and control pest infestations and found that the service aspects of the transaction predominated, and therefore the UCC did not apply.<sup>25</sup>

#### B. UCC Statute of Limitations

In *Troyer v. Cowles Products Co.*,<sup>26</sup> on rehearing, the court of appeals clarified that the four-year statute of limitations applicable to a sale of goods under Indiana Code section 26-1-10-102 and Indiana Code section 26-1-2-725 takes precedence over the six-year limitation period for a suit on an account under Indiana Code section 34-11-2-7.<sup>27</sup> Specifically, Indiana Code section 26-1-10-102 provides that "[t]o the extent that . . . IC 34-11-2 prescribe[s] statutes of limitations inconsistent with IC 26-1-2-725, IC 26-1-2-725 prevails."<sup>28</sup> Thus, this action for failure to pay for goods purchased and delivered was time barred. Additionally, the court of appeals made the important observation that Indiana Code section 34-11-2-7 was not repealed by the Indiana legislature, and therefore its six-year limitation period "is still applicable to actions on accounts dealing with, for example, services or labor; in other words, any accounts not otherwise covered by the UCC."<sup>29</sup>

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21. 723 N.E.2d 881 (Ind. Ct. App), *trans. granted*, 741 N.E.2d 1249 (Ind. 2000).

22. 612 N.E.2d 550, 553-54 (Ind. 1993).

23. *Id.* at 554.

24. *See Dow Chemical*, 723 N.E.2d. at 905 (citing *Insul-Mark Midwest*, 612 N.E.2d at 555).

25. *See id.*

26. 732 N.E.2d 246 (Ind. Ct. App. 2000).

27. *See id.* at 247.

28. IND. CODE § 26-1-10-102 (1995).

29. *Troyer*, 732 N.E.2d at 247.



## II. ARTICLE 4—STOP PAYMENT ORDERS

In *Gallant Insurance Co. v. Amaizo Federal Credit Union*,<sup>30</sup> the court of appeals addressed the rights and obligations of a payor when a stop payment order is issued for a check. Jack Blanton's car was stolen in late December 1995. Blanton notified his insurer (Gallant), and the credit union (Amaizo) that held a purchase money security interest in the vehicle. On February 26, 1996, Gallant prepared a check for the value of the vehicle, naming Blanton and the credit union as co-payees. Two days later, the police mailed Blanton a notice stating that his car had been recovered. However, on March 1, 1996, Blanton forwarded the insurance check to the Credit Union before he had received the notice of recovery from the police. On March 7, 1996, Amaizo forwarded the car's title to Gallant, as Gallant had requested. Amaizo deposited the check into its account on March 8, 1996. By March 14, 1996, Blanton had obtained another loan from Amaizo and purchased a replacement car. That same day, Gallant first learned that Blanton's original car had been recovered and was repairable. Later that same day, Gallant informed the credit union it was stopping payment on the check, and Gallant instructed its bank to do so. Subsequently, Gallant sent the recovered car to an auto body shop for repair. Gallant then paid all the repair fees except for the \$500 deductible it claimed was owed by Blanton. When the auto body shop threatened to sell the car at auction for the unpaid repair and storage charges, litigation was commenced by the credit union against Gallant and the auto body shop. The trial court ruled in favor of the credit union and against Gallant. Gallant appealed, and two issues were presented to the appellate court: (1) whether Indiana Code section 26-1-4-303 prevented Gallant from issuing the stop payment order on the settlement check, and (2) whether stopping payment on the check was a breach of the insurance contract between Gallant and Blanton.<sup>31</sup>

The court of appeals correctly observed that Indiana Code section 26-1-4-303 addresses the obligations of the payor's bank with respect to stop payment orders, but it does not address the rights of the payor who is requesting the stop payment order.<sup>32</sup> The court concluded that the trial court erred in basing its ruling on Indiana Code section 26-1-4-303 because that provision "is simply not relevant in determining whether a party that may have the statutory power to stop payment also has a legal right to do so."<sup>33</sup>

The determination of whether Gallant had breached the insurance contract turned on the interpretation of policy language providing that the insurance company may pay for a loss in money, or before the loss was *paid*, may repair or replace the property or return stolen property to the insured.<sup>34</sup> The appellate court found that the policy language was ambiguous as to the meaning of the

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30. 726 N.E.2d 860 (Ind. Ct. App. 2000).

31. *See id.* at 863-64.

32. *See id.*

33. *Id.*

34. *See id.*



word "paid" and would strictly construe the meaning of "paid" in the insurance contract against the insurer. Here, whether Gallant "paid" Blanton before it elected to repair the car depends on a determination of when payment by check becomes "final." The court of appeals looked to *O'Donnell v. American Employers Insurance Co.*<sup>35</sup> and Indiana Code section 26-1-2-511 for guidance and concluded that "Blanton's loss was 'paid' when Gallant tendered the check to Blanton and the Credit Union."<sup>36</sup> In support of its conclusion, the appellate court observed that the conduct of the parties supported the view that they both considered the loss "paid."<sup>37</sup> Specifically, the court focused on the fact that Gallant had requested and received the title to the then missing car upon mailing of the settlement check and not upon the check's payment by Gallant's bank. Thus, the stop payment order was issued by Gallant after the loss was already "paid," and thereby breached the insurance contract.<sup>38</sup>

Under the UCC, a party may be liable for stopping payment on a check if the party does not have "valid legal cause" to do so.<sup>39</sup> "Valid legal cause" may include "a recognized legal defense at the trial instituted to collect on the check."<sup>40</sup> Because the credit union was successful against Gallant in the action to collect on the check, Gallant did not have a valid legal cause to stop payment on the check. Under Indiana Code section 26-2-7-5(3), those who wrongfully stop payment on a check are liable for reasonable attorney's fees,<sup>41</sup> and the appellate court affirmed an award of attorney's fees to the credit union.

### III. ARTICLE 9—NOTICE OF SALE OF COLLATERAL

*Walker v. McTague*<sup>42</sup> construes the provisions of Article 9 of the UCC dealing with the notice requirements for a commercially reasonable sale of collateral. Indiana Code section 26-1-9-504 gives a secured party the right to sell or otherwise dispose of the collateral after the default of the debtor.<sup>43</sup> However, such sales must in all respects be "commercially reasonable," and prior notice of the impending sale must be provided to the debtor.<sup>44</sup> If adequate notice is not given to the debtor within a reasonable time before the sale, the statute raises a rebuttable presumption that the value of the collateral at the time of the sale was equal to the amount of the debt, thus depriving the creditor from seeking any "deficiency" amount from the debtor.<sup>45</sup> In this case, the letter notifying the

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35. 622 N.E.2d 570 (Ind. Ct. App. 1993).

36. *Gallant*, 726 N.E.2d at 866.

37. *See id.* at 866-67.

38. *See id.* at 867.

39. IND. CODE § 26-2-7-4(1) (1995).

40. *Gallant*, 726 N.E.2d at 867 (quoting *Dishman v. Hill*, 578 N.E.2d 654, 656 (Ind. 1991)).

41. *See* IND. CODE § 26-2-7-5(3) (1995).

42. 737 N.E.2d 404 (Ind. Ct. App. 2000).

43. *See* IND. CODE § 26-1-9-504 (1995).

44. *Id.* § 26-1-9-504(1).

45. *See Vanek v. Ind. Nat'l Bank*, 540 N.E.2d. 81, 83 (Ind. Ct. App. 1989), *aff'd*, 551



McTagues' lawyer<sup>46</sup> of the sale was misaddressed and never received.<sup>47</sup> Thus, the trial court presumed that notice was not given to the debtors, and the presumptions regarding the value of the collateral under Indiana Code section 26-1-9-504(3) came into play, thereby requiring Walker to prove that the sale was commercially reasonable and the value of the collateral less than the debt.<sup>48</sup>

The court examined several factors to determine whether the sale was commercially reasonable including: (1) whether a fair sale price was received at the sale, (2) the extent to which the sale price differed from the amount of the debt, (3) whether the sale was on a retail or wholesale basis, (4) the number of bids solicited or received, and (5) whether the time and place of the sale was "reasonably calculated to bring a satisfactory turnout of bidders."<sup>49</sup> Whether a sale is commercially reasonable is a question of fact, and no single factor, including the price obtained, is determinative. All of the relevant factors must be considered together.<sup>50</sup>

The evidence in this case showed that the value of the business was about \$250,000, which was only slightly less than the \$256,499 debt. However, the business was sold for only \$50,000 at a closed-bid auction where only one bid was received. Under these circumstances, the appellate court concluded that it was not error to find that the sale was not commercially reasonable and that Walker should be denied a judgment for the deficiency between the sale amount and the debt.<sup>51</sup>

Under revised Article 9, the disposition of collateral must still be conducted in a commercially reasonable manner<sup>52</sup> and with advance notice to the debtor.<sup>53</sup> However, revised Article 9 provides additional details for giving such notices and several "safe harbor" rules for complying with the requirement to give adequate notice for a commercially reasonable sale.<sup>54</sup> Separate rules are provided for consumer-goods transactions.<sup>55</sup> These rules generally provide additional

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N.E.2d.1143 (Ind. 1990).

46. The McTagues were guarantors of the debt of McTague Properties, but under Indiana Code section 26-1-9-504(3), they were entitled to the same notice as the primary debtor. *See Walker*, 737 N.E.2d at 409. Furthermore, the rights of a guarantor to have notice of the post-default disposition of collateral may not be waived. *See id.* at 409 n.3; *see also* McEntire v. Ind. Nat'l Bank, 471 N.E.2d 1216, 1226 (Ind. Ct. App. 1984). Under revised Article 9, the obligation to provide notice of a sale or other disposition of collateral to secondary debtors such as guarantors is made explicit. *See* IND. CODE § 26-1-9.1-611(c)(2) (Supp. 2000).

47. *See Walker*, 737 N.E.2d at 409.

48. *See id.*

49. *Id.* at 410.

50. *See id.* (citing *Hall v. Owen County State Bank*, 70 N.E.2d 918, 930 (Ind. Ct. App. 1977)).

51. *See id.* at 410-11.

52. *See* IND. CODE § 26-1-9.1-610 (Supp. 2000).

53. *See id.* § 26-1-9.1-611.

54. *See id.* §§ 26-1-9.1-612 and -613.

55. *See id.* § 26-1-9.1-614.



protections for consumers and apply an objective standard regarding good faith and commercial reasonableness to transactions.<sup>56</sup>

Given the requirement in revised Article 9 to provide timely and adequate notice to debtors before disposition of the collateral, the outcome in *Walker v. McTague* would not likely be any different under revised Article 9. What is a reasonable time for providing such notices is still a question of fact, but under revised Article 9, ten days is deemed sufficient for non-consumer transactions.<sup>57</sup> However, where no notice was received due to the secured party's error, the result would likely be the same under revised Article 9. Similarly, where the price is substantially below the amount of the debt and other evidence shows the value of the collateral to be significantly greater than price obtained at the sale, the result under revised Article 9 is not likely to be different.

#### IV. REVISED ARTICLE 9

As stated above, this article cannot cover all the changes that have been made to Article 9. Several publications have attempted to outline all of the changes, and each covers hundreds of pages.<sup>58</sup> Indiana's enactment of revised Article 9 took place in early 2000, but does not include all of the 2000 refinements.

This revision of Article 9 is the first major revision undertaken by the NCCUSL since Article 9 was first adopted in 1972. The changes are significant, including an expansion of the scope of the Article and changes to many procedural and substantive rules. The stated purpose of the revision is to make the rules more consistent among the states and to make secured transactions more predictable.<sup>59</sup> It is intended that this consistency and predictability will reduce the cost of secured transactions and thereby reduce the cost of credit.<sup>60</sup> Although revised Article 9 does not depart radically from its predecessor statute with respect to the concepts of attachment, priority, and enforcement of security interests, it does add definitions and greater specificity to procedural rules. The rules pertaining to the perfection of security interests have been completely revised, and the revisions are so extensive that they will only be discussed here in cursory fashion. Revised Article 9 is meant to build upon prior law, while modernizing it to reflect technological advances, bringing greater clarity and predictability to secured transactions.<sup>61</sup>

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56. *See id.* § 26-1-9.1-102(a)(43).

57. *See id.* § 26-1-9.1-612.

58. *See, e.g.,* THE NEW ARTICLE 9: UNIFORM COMMERCIAL CODE (Corinne Cooper ed., 2d ed. 2000); JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE (1999). In addition, Article 9 may still be a moving target because, in August 1999, October 1999, January 2000, March 2000, May 2000, and July 2000, NCCUSL promulgated numerous amendments and corrections to the revised text. Other revisions or refinements may follow. *See supra* note 11 and accompanying text.

59. *See* U.C.C. § 9-101 cmt. 1 (rev. 1999).

60. *See id.*

61. *See id.*



By expanding the scope of Article 9 and applying it to additional types of collateral, recognizing electronic forms of commerce<sup>62</sup> and simplifying certain rules for creating, perfecting and enforcing security interests, the drafters attempted to make Article 9 more “user friendly” and nationally consistent.<sup>63</sup> In addition, revised Article 9 now contains specific rules for certain consumer transactions.<sup>64</sup> Revised Article 9 applies to *all* transactions that come within its scope,<sup>65</sup> including those transactions that were not covered by prior Article 9 and transactions entered into before the effective date of revised Article 9.<sup>66</sup> This broad application may cause some surprises during the transition period. Existing security agreements and financing statements may require revision to continue to protect the interests for which they were intended, and affirmative steps may be required to maintain the priority and status of secured creditors in existing collateral.<sup>67</sup>

It will take some time before the provisions of this revised statute are tested in the courts and before decisions applying the new statute are published to provide guidance for interpreting and applying the statute. All of those who deal with the creation or enforcement of security interests in personal property are well advised to study the new statute.

#### *A. Expanded Scope of Revised Article 9*

Revised Article 9 covers certain types of collateral not previously included in Article 9. Specifically, the definition of “accounts”<sup>68</sup> has been expanded to include payment obligations that arise out of a sale, lease or license of all types of tangible and intangible property. Thus, certain property, that might have been considered “general intangibles” under prior Article 9, is now included in the definition of “accounts.” Credit card receivables are now included in the definition of accounts, as are license fees for the use of software.<sup>69</sup> Under revised Article 9, obligations in which the debtor’s primary obligation is the payment of money, but where the payment rights do not arise out of an “instrument,” remain in the category of “general intangibles.”<sup>70</sup> The sale of these payment intangibles

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62. For example, revised Article 9 provides for “authentication” of “records” rather than signatures on written documents. See IND. CODE §§ 26-1-9.1-102(7), (69) (2000).

63. See U.C.C. § 9-101 cmt. 1 (rev. 1999).

64. See, e.g., IND. CODE §§ 26-1-9.1-102(22)-(26) for relevant definitions and IND. CODE ANN. § 26-1-9.1-201 regarding applicability of other laws in consumer transactions. The rules for consumer transactions are interspersed throughout Article 9 and are not found in any single portion of the Article.

65. See *id.* § 26-1-9.1-109(a).

66. See *id.* § 26-1-9.1-702.

67. See *id.*

68. See *id.* § 26-1-9.1-102(a)(2) (Supp. 2000).

69. See *id.*

70. See *id.* § 26-1-9.1-102(a)(42).



and software are both transactions covered by revised Article 9.<sup>71</sup> The inclusion of these additional types of "accounts" and payment intangibles within the scope of revised Article 9, reflects the use of these types of collateral in myriad financing transactions. Other revisions to Article 9 are intended to strengthen existing provisions, to preclude any restriction that limits the creation, perfection or enforcement of secured interests in payment intangibles.<sup>72</sup>

Revised Article 9 also extends to security interests in bank deposit accounts given as original collateral,<sup>73</sup> and to the insurance receivables arising from the provision of health care services.<sup>74</sup> Official Comment 4 to Revised Article 9 section 109(a) recognizes that the distinction between outright sales of receivables and sales to secure an obligation may still be somewhat blurred, as both are used in financing transactions, but the distinction between the two "is left to the courts."<sup>75</sup> In addition, other collateral, such as agricultural liens<sup>76</sup> and letter of credit rights are now included within the scope of revised Article 9.<sup>77</sup> Consignments are also now included in Article 9.<sup>78</sup>

For the first time, commercial tort claims are included within the parameters of Article 9.<sup>79</sup> Commercial tort claims, as defined by revised Article 9, include any claim of an organization or any claim of an individual that "(i) arose in the course of the claimant's business or profession; and (ii) does not include damages arising out of personal injury to or the death of an individual."<sup>80</sup> Revised Article 9 permits creditors to acquire security interests in after-acquired property, but does not permit a security interest to attach to after-acquired commercial tort claims.<sup>81</sup> Thus, only commercial tort claims existing at the time the security agreement is authenticated are included.

### *B. Parties*

Revised Article 9 modifies the terminology used in secured transactions. Under prior Article 9, the "debtor" is the party who owns the collateral or the party who owes the payment or performance obligation secured by the collateral, in which the security interest has been taken.<sup>82</sup> Under revised Article 9, a "debtor" may be any party who has a property interest other than a security

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71. *See id.*

72. *See id.* §§ 26-1-9.1-406, 26-1-9.1-408.

73. *See id.* § 26-1-9.1-104.

74. *See id.* § 26-1-9.1-102(a)(46).

75. U.C.C. § 9-109 cmt. 4 (Rev. 1999).

76. *See* IND. CODE § 26-1-9.1-109(a)(2) (Supp. 2000).

77. *See id.* § 26-1-9.1-109(a).

78. *See id.* § 26-1-9.1-109(a)(4).

79. *See id.* § 26-1-9.1-109(d)(12).

80. *Id.* § 26-1-9.1-102(a)(13).

81. *See id.* § 26-1-9.1-204(b)(2).

82. *See id.* § 26-1-9-105(1)(d).



interest or lien in the collateral.<sup>83</sup> This new definition of “debtor” includes the seller of a payment intangible, a consignee, and one who has a property interest in collateral subject to an agricultural lien.<sup>84</sup> The party who owes the obligation being secured is referred to as the “obligor.”<sup>85</sup> A “secured party” under revised Article 9 is still the party to whom the security interest is granted.<sup>86</sup> However, “secured party” also now includes the buyer of payment intangibles and promissory notes, a consignor, the holder of an agricultural lien, and agents and trustees of secured parties.<sup>87</sup> Those who are drafting security agreements should be cognizant of this new terminology and seek to use the terms in a manner that avoids confusion and conforms with the definitions in the revised act.

### *C. Collateral*

Under prior law, a secured party must either possess the collateral (or, in the case of investment property, have a right to control the property) or have a signed security agreement describing the collateral. Now, under revised Article 9, a secured party may possess collateral when the collateral is in the hands of a third party pursuant to an agreement signed by the debtor and the third party or an authenticated record providing for such possession by the third party.<sup>88</sup> If the collateral is a registered security in certificate form, it must be delivered to the secured party in accordance with Indiana Code section 26-1-8.1-301.<sup>89</sup> The concept of control of collateral has been expanded to accommodate security interests in deposit accounts, electronic chattel paper and letter of credit rights.<sup>90</sup>

The rules for identification of collateral in security agreements have not changed substantially. However, a reference in a security agreement to “all assets” or “all of the debtor’s personal property” is insufficient under revised Article 9.<sup>91</sup> Descriptions of collateral are generally sufficient if the “identity of the collateral is objectively determinable.”<sup>92</sup> However, a financing statement may still refer to “all assets” or “all personal property” of the debtor under revised Article 9.<sup>93</sup>

Specific identification is required in security agreements for commercial tort claims and, in consumer transactions, for consumer goods, securities or commodities accounts.<sup>94</sup> Where the collateral is timber to be cut, the security

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83. *See id.* § 26-1-9.1-102(a)(28)(A).

84. *See id.* § 26-1-9.1-102(a)(28).

85. *See id.* § 26-1-9.1-102(a)(59).

86. *See id.* § 26-1-9.1-102(a)(72)(A).

87. *See id.* § 26-1-9.1-102(a)(72).

88. *See id.* §§ 26-1-9.1-203(b)(3)(B), 26-1-9.1-313(c)(1).

89. *See id.* § 26-1-9.1-203(b)(3)(C).

90. *See id.* § 26-1-9.1-203(b)(3)(D).

91. *See id.* §§ 26-1-9.1-108(c), 26-1-9.1-203(b)(3)(A).

92. *Id.* § 26-1-9.1-108(b)(6).

93. *Id.* § 26-1-9.1-504.

94. *See id.* § 26-1-9.1-108(e).



agreement must contain a description of the real estate.<sup>95</sup> Revised Article 9 continues to allow a security interest to attach to collateral in the case of future advances, but no longer requires the advances to be related to the original debt or to be of the same type of obligation.<sup>96</sup>

#### *D. Perfection and Financing Statements*

The principles pertaining to perfection of security interests are included in Part 3 of revised Article 9. Under revised Article 9, as with its predecessor, filing a financing statement remains the primary method of perfecting a security interest. However, along with the expanded scope of revised Article 9, the rules for perfection by control of the property are also expanded.<sup>97</sup> These rules are complex and their application will be affected by the location of the debtor.<sup>98</sup> A thorough discussion of these rules is beyond the scope of this survey article.

The requirements for filing a financing statement are simplified in revised Article 9. Now, the identity of the debtor, the identity of the secured party, a description of the collateral and authentication by the debtor are generally sufficient.<sup>99</sup> Identification of a debtor by a trade name is insufficient.<sup>100</sup> Because the rules for where financing statements must be filed have changed, the security agreement should contain representations and warranties regarding the nature of the debtor and state of formation of the debtor.<sup>101</sup> As a general rule, new financing statements must be filed in the state of the debtor's formation.<sup>102</sup> Financing statements for foreign debtors must be filed in Washington, D.C.<sup>103</sup> Secured parties are automatically authorized to file a financing statement consistent with a security agreement, but must obtain authorization from the debtor to file a financing statement before the security agreement has been authenticated.<sup>104</sup>

#### *E. Transition Rules*

During the next few months, the transition rules found in part 7 of revised Article 9 will be very important to practitioners and those attempting to perfect or enforce a security interest. Because of important differences between Article 9 and revised Article 9 with respect to the scope and the mechanisms for perfecting security interests, a set of transition rules has been included in revised

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95. *See id.* § 26-1-9.1-203(b)(3)(A).

96. *See id.* § 26-1-9.1-204.

97. *See id.* §§ 26-1-9.1-304-306, 26-1-9.1-312 to -314.

98. *See id.* §§ 26-1-9.1-304-306.

99. *See id.* §§ 26-1-9.1-502, 26-1-9.1-503.

100. *See id.* § 26-1-9.1-503.

101. *See generally id.* § 26-1-9.1-516(b) (governing the filing of financing statements).

102. *See id.* § 26-1-9.1-502; *see also id.* § 26-1-9.1-307(a) (defining the debtor's location and place of business).

103. *See id.* § 26-1-9.1-307.

104. *See id.* § 26-1-9.1-509(b).



Article 9.<sup>105</sup> As a general rule, the transition rules in part 7 apply during the twelve-month period following July 1, 2001. Further, revised Article 9 applies to any transaction or lien within its scope, even if the transaction or lien was entered into or created before July 1, 2001.<sup>106</sup> All liens and transactions that were effective before adoption of revised Article 9 remain unaffected, except as specifically provided in part 7 of revised Article 9.<sup>107</sup>

Those security interests that were perfected under Article 9 before the revision, or were perfected under law other than Article 9, remain perfected after July 1, 2001 as long as the acts necessary to perfect the security interest under prior law or law outside Article 9 would also be sufficient to perfect the security interest under revised Article 9.<sup>108</sup> In other words, if the perfection of a lien complies with the requirements for perfection under revised Article 9, the secured creditor need take no further action, and the security interest will continue in effect under revised Article 9.<sup>109</sup>

However, security interests perfected under prior Article 9 law or perfected under law outside of Article 9, where the steps for perfecting the lien do not comply with those required under revised Article 9, remain effective for only one year, or until June 30, 2002, unless either the security interest becomes enforceable under the terms of Indiana Code section 26-1-9.1-203 before July 1, 2002, or the lien holder complies with the perfection requirements of revised Article 9 before July 1, 2002.<sup>110</sup> Thus, holders of these types of security interests must take additional steps during the year following July 1, 2001 to insure that their security interests remain perfected.<sup>111</sup> Because of the expanded scope of revised Article 9, perfection requirements now apply to transactions, such as commercial tort claims, that were not previously covered, and the lienholder must take additional steps to protect such interests.

Security interests that attached or became enforceable, but were not perfected, under prior law, remain enforceable for one year, or until June 30, 2002, under revised Article 9, only to the extent that they were enforceable under prior law.<sup>112</sup> Such a security interest may be perfected under revised Article 9 by complying with its provisions before or after July 1, 2001.<sup>113</sup>

There are additional provisions for continuing the attachment and perfection of security interests found in section 705.<sup>114</sup> As a general rule, perfection of security interests will continue to be effective only where acts taken to perfect the

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105. *See id.* §§ 26-1-9.1-701 to -709.

106. *See id.* § 26-1-9.1-702.

107. *See id.* §§ 26-1-9.1-702(a), (b).

108. *See id.* § 26-1-9.1-703(a).

109. *See id.* § 26-1-9.1-703(a).

110. *See id.* § 26-1-9.1-703(b).

111. *See id.* § 26-1-9.1-703(b)(3).

112. *See id.* § 26-1-9.1-704.

113. *See id.* §§ 26-1-9.1-704(2) and (3).

114. *See id.* § 26-1-9.1-705.



security interest meet the requirements of revised Article 9.<sup>115</sup> Financing statements filed before July 1, 2001 that do not meet revised Article 9 requirements because, for example, the descriptions of collateral are insufficient or they were not filed in the right place, remain effective only during the one-year transition period.<sup>116</sup> To avoid losing priority over other lienholders or being relegated to the status of an unsecured creditor, creditors must assure themselves that any previously filed financing statements are sufficient under revised Article 9.

Financing statements filed under prior law, but which nevertheless fulfill the requirements of revised Article 9, remain effective until the earlier of (a) the normal date on which the financing statement would lapse (usually five years after filing) or (b) June 30, 2006, which is five years from the effective date of the new statute.<sup>117</sup> Continuation statements may be filed before July 1, 2001, to continue the effectiveness of financing statements filed under prior law, only in the same state as the original financing statement and will be effective as continuation statements only if that state is also the correct state for filing a financing statement under revised Article 9.<sup>118</sup> In addition, the continuation statement must bring the financing statement into compliance with all requirements under revised Article 9 and must be filed within six months of the date before the financing statement would lapse.<sup>119</sup>

A financing statement filed under prior law and before July 1, 2001 may also be continued by filing a new financing statement under revised Article 9.<sup>120</sup> To be effective as a continuation, this new financing statement must also be filed in the proper state and must make reference to the prior statement so that the new statement can be identified as a continuation of the prior statement.<sup>121</sup> This identification requires reference to the date of the prior statement, prior filing numbers, the office where the original statement was filed, and any other continuation statements.<sup>122</sup> This statement must also indicate the lienholder's intent that the prior statement continue in effect.<sup>123</sup> New financing statements filed under this provision and intended to continue a prior statement may be filed at any time before the original statement lapses.<sup>124</sup>

Financing statements filed under prior law may also be terminated or amended by filing new financing statements that conform with revised Article 9. A prior financing statement may be terminated, but not amended, after July 1, 2001, only by filing a new statement in the state where the original financing

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115. *See id.*

116. *See id.*

117. *See id.* § 26-1-9.1-705(c).

118. *See id.* § 26-1-9.1-705(d)-(f).

119. *See id.*

120. *See id.* § 26-1-9.1-706(a).

121. *See id.* § 26-1-9.1-706(c).

122. *See id.*

123. *See id.*

124. *See id.*



statement was filed, even if that is not the state where a financing statement would otherwise be required to be filed under revised Article 9.<sup>125</sup> However, if a financing statement has been filed under revised Article 9 to continue a prior law financing statement, that statement may only be terminated in the state with jurisdiction under revised Article 9.<sup>126</sup> In addition, if a financing statement is governed by prior Indiana law, it may be continued in Indiana only by complying with the provisions of Indiana Code section 26-1-9.1-705 (d), 26-1-9.1-705(f) or 26-1-9.1-706. The filing of new or continuation financing statements requires the consent of the secured party of record and must be necessary under revised Article 9.<sup>127</sup>

Prior Article 9 will continue to determine the relative priority of competing liens when established prior to July 1, 2001.<sup>128</sup> In all other cases, revised Article 9 will determine the relative priority of competing lienholders.<sup>129</sup> Under revised Article 9, priority will be established on the basis of the date on which Article 9 requirements were satisfied, unless both competing lienholders relied on Indiana Code section 26-1-9.1-704, in which case filing date of the prior statement will determine relative priorities.<sup>130</sup>

#### CONCLUSION

Although there was little change to UCC law through judicial pronouncements, the legislative changes to UCC Article 9 are significant. Though judicial interpretations of these changes are not likely to be available for some time, debtors, creditors, and their legal advisors will feel their impact immediately. Whether the NCCUSL has succeeded in making the law of secured transactions simpler and more predictable will soon become apparent.

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125. *See id.* § 26-1-9.1-707(b).

126. *See id.*

127. *See id.* § 26-1-9.1-708.

128. *See id.* § 26-1-9.1-709.

129. *See id.*

130. *See id.*







# RECENT SURVEY OF WORKER'S COMPENSATION LAW

CAROL MODESITT WYATT\*

## INTRODUCTION

This Article surveys 1999-2000 cases construing the Indiana Worker's Compensation Act (hereinafter the "Act")<sup>1</sup>. During this time, the courts addressed many significant issues affecting Indiana practitioners including the constitutionality of the bad faith provision, the extent of the ingress/egress exception, statutory attorney's fees, and workplace violence. Important legislative changes to the Act also occurred this year.

### I. THE BAD FAITH PROVISION IS CHALLENGED

In 1998 the legislature enacted Indiana Code section 22-3-4-12.1, which gives the Worker's Compensation Board exclusive jurisdiction to adjudicate whether an employer, a worker's compensation administrator, or a carrier "has acted with a lack of diligence, in bad faith, or has committed an independent tort in adjusting or settling the claim for compensation."<sup>2</sup> The bad faith provision allows the employee to recover between \$500 and \$20,000, "depending upon the degree of culpability and the actual damages sustained."<sup>3</sup> Prior to the enactment of this provision, an employee could maintain a civil action against his employer, worker's compensation administrator, or carrier where the employee was alleging an independent tort, fraud, or gross negligence.<sup>4</sup>

Since the effective date of the bad faith provision, practitioners have observed an increasing number of applications for adjustment of claims that allege an act of bad faith, a lack of diligence, or an independent tort falling within the Board's jurisdiction. In 1999, the courts began construing this provision.<sup>5</sup> In those decisions, the courts addressed the retroactive applicability of the provision, the constitutionality of the provision, and the meaning of the terms adjusting or settling an independent tort. In 2000, the courts' focus returned to the constitutionality issue in *Sims v. United States Fidelity & Guaranty Co.*<sup>6</sup>

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1. IND. CODE §§ 22-3-1-1 to 22-3-12-5 (1998).

2. IND. CODE § 22-3-4-12.1 (1998) (hereinafter "the bad faith provision").

3. *Id.*

4. *See, e.g.,* *Vakos v. Travelers Ins.*, 691 N.E.2d 499 (Ind. Ct. App. 1998); *Stump v. Commercial Union*, 601 N.E.2d 327 (Ind. 1992).

5. *See, e.g.,* *Borgman v. State Farm Ins. Co.*, 713 N.E.2d 851 (Ind. Ct. App. 1999) (holding that retroactive application of the bad faith provision was appropriate and that the bad faith provision was constitutional); *Samm v. Great Dane Trailers*, 715 N.E.2d 420 (Ind. Ct. App. 1999) (finding employee's retaliatory discharge claim was not an independent tort within the meaning of the bad faith provision, but defamation, depending on when it occurred, was an independent tort within the bad faith provision).

6. 730 N.E.2d 232 (Ind. Ct. App. 2000), *trans. granted by* No. 49502-0105-CV-229, 2001



In *Sims*, the employee was a laborer who tripped over a welding lead that was across a stairway causing him to fall down the stairway resulting in bodily injury. The employee reported the injury and contacted United States Fidelity & Guaranty Company (USF&G), the employer's worker's compensation carrier. The employee attempted to contact USF&G on two occasions to schedule medical care and arrange for payment of temporary total disability benefits. USF&G failed to respond. Consequently, Sims filed a complaint in civil court against USF&G alleging gross negligence, intentional infliction of emotional distress, and intentional deprivation of statutory rights under the Act.<sup>7</sup>

Relying on the bad faith provision of the Act, USF&G filed a motion to dismiss for lack of subject matter jurisdiction. USF&G argued that, under the bad faith provision, the Worker's Compensation Board has the exclusive jurisdiction to determine whether the employer or the employer's worker's compensation carrier "has acted with a lack of diligence, in bad faith, or has committed an independent tort in adjusting or settling the claim for compensation."<sup>8</sup> The trial court granted USF&G's motion to dismiss.<sup>9</sup>

On appeal, Sims argued the bad faith provision was unconstitutional on grounds that it violated the open courts provision of the Indiana Constitution<sup>10</sup> and his constitutional right to a jury trial under the Indiana Constitution.<sup>11</sup> Relying on *Stump v. Commercial Union*<sup>12</sup> and *Martin v. Richey*,<sup>13</sup> the court found the bad faith provision unconstitutional on both grounds.<sup>14</sup>

The Indiana open courts constitutional provision provides: "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."<sup>15</sup> In determining whether the bad faith provision violated Article I, Section 12, the court considered the recent supreme court decision in *Martin v. Richey*.<sup>16</sup> In *Martin*, the court held the legislature could abrogate common law rights and remedies, as long as doing so did not interfere with one's constitutional rights.<sup>17</sup> Although the legislature has the right to abrogate rights and remedies available under the Act, the court specifically noted that an independent tort against the carrier was not the type of harm the Act was

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Ind. LEXIS 416, at \*1 (Ind. May 4, 2001).

7. See *id.* at 234.

8. See *id.* (quoting IND. CODE § 22-3-4-12.1 (2000)).

9. See *id.*

10. IND. CONST. art. I, § 12.

11. IND. CONST. art. I, § 20.

12. 601 N.E.2d 327 (Ind. 1992).

13. 711 N.E.2d 1273 (Ind. 1999) (considering the constitutionality of the medical malpractice statute of limitations).

14. See *Sims*, 730 N.E.2d at 237.

15. IND. CONST. art. I, § 12.

16. See *Sims*, 730 N.E.2d at 237.

17. See *Martin*, 711 N.E.2d at 1283.



intended to compensate and, thus, it would be unconstitutional to deprive injured workers who have been subsequently harmed by the malfeasance of the insurer of the right to a complete tort remedy.<sup>18</sup>

Sims also argued that the bad faith provision violated his constitutional right to a jury trial.<sup>19</sup> The court observed that the jury trial right is preserved only when the action was triable by a jury at common law. USF&G argued that, under *Warren v. Indiana Telephone Co.*,<sup>20</sup> the Indiana Supreme Court held that the Act does not abrogate the right to a jury trial because the rights and duties created by the Act are contractual in nature and arise out of the voluntary acceptance of such terms. The court found USF&G's argument unpersuasive and, in addition to holding that the bad faith provision violated the open court's provision of the Indiana Constitution, it also found that it violated the constitutional right to trial by jury.<sup>21</sup>

In the dissenting opinion, Judge Baker noted that the intentional torts at issue "are an offshoot of the Worker's Compensation Act: but for the Act there would be no insurance carrier against whom to bring an action."<sup>22</sup> It seems Judge Baker opines that the legislature cannot abrogate common law rights that would not exist but for the statutory creation of the Act from which those rights arise. Further, Judge Baker specifically stated that the majority's reliance on *Stump* was misplaced because the statute was enacted after the *Stump* decision and, in all likelihood, was a reaction to *Stump* and prior cases.<sup>23</sup> In light of the legislative and case law history, Judge Baker advocated deferring to the legislature and upholding the constitutionality of the bad faith provision.

Interestingly, Judge Baker also addressed the \$20,000 limitation on the recovery for a bad faith or independent tort claim brought pursuant to the bad faith provision.<sup>24</sup> Whereas the majority stated that this issue was not properly before the court,<sup>25</sup> Judge Baker felt compelled to point out the dangers of such a low monetary limit on recovery for such actions. Specifically, Judge Baker stated, "the \$20,000 limitation set forth in the statute may very well preclude meaningful recovery in some instances. Thus, I agree with *Sims*' assertion that such a cap serves to bar a complete remedy for some claimants."<sup>26</sup> Judge Baker believed that such a low limitation on a recovery simply invites such constitutional attacks and urged the legislature to increase the limitation.<sup>27</sup>

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18. See *Sims*, 730 N.E.2d at 236.

19. See *id.* at 237 (citing IND. CONST. art. I, § 20 (providing that, "[i]n all civil cases, the right of trial by jury shall remain inviolate"))).

20. 26 N.E.2d 399 (Ind. 1940).

21. See *Sims*, 730 N.E.2d at 237.

22. *Id.* at 237-38 (Baker, J., dissenting).

23. See *id.* at 238.

24. See *id.* at 239.

25. See *id.* at 233 n.1.

26. *Id.* at 239 (Baker, J., dissenting).

27. See *id.* At the time this Article was sent to print, transfer to the Indiana Supreme Court was pending. It remains to be seen whether *Sims* will be upheld or whether the Indiana Supreme



## II. COURT OF APPEALS EXTENDS THE INGRESS/EGRESS EXCEPTION

In *Clemans v. Wishard Memorial Hospital*,<sup>28</sup> an employee was crossing a public thoroughfare, to reach her vehicle parked in an employer-provided parking lot at the end of her work day. A vehicle struck and severely injured the employee when she crossed the public street. The parties stipulated that the street was neither owned nor controlled by the employer, Wishard Memorial Hospital. Further, Wishard provided a covered tunnel that connected the building in which Clemans worked to the lot, where her car was parked. Such a path would not have required Clemans to cross a public street. However, Wishard neither required nor encouraged its employees to travel the covered tunnel but, instead, left the means of access to the lot to the employees' discretion.<sup>29</sup>

As a result of her injuries, Clemans filed an Application for Adjustment of Claim seeking worker's compensation benefits. Wishard denied her claim stating that her injuries did not arise out of and in the course of her employment.<sup>30</sup> The single hearing member and the full board agreed with Wishard's position. On appeal, the court reversed the Board's decision.<sup>31</sup>

The issue presented to the court of appeals was whether Clemans' injuries arose out of and in the course of her employment with Wishard. The court noted that the "'in the course of' [employment] element refers to the time, place, and circumstances of the accident, [whereas the term] 'arising out of' element refers to the causal connection between the accident and the employment."<sup>32</sup> Indiana courts have long recognized that 'in the course' of one's employment is not limited to the moment when an employee reaches the place where he or she begins his or her workday or to the moment he or she ceases work activities.<sup>33</sup> Instead, the courts have crafted the ingress/egress rule to extend coverage of the

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Court will reverse the Court of Appeals' decision. Interestingly, should the bad faith statute eventually be upheld, the legislature recently amended the provision to put an overall cap on the amount of damages recoverable as to an individual's claims against a single employer by adding the following language: "(f) An award or awards to a claimant pursuant to subsection (b) shall not total more than twenty thousand dollars (\$20,000) during the life of the claim for benefits arising from an accidental injury." IND. CODE § 22-3-4-12.1(f) (1998). By way of this new language, the Legislature hopefully has curbed the growing trend of filing repetitive (multiple) bad faith claims between one employee and one employer. Regardless of the number of separate allegations of bad faith that are made, the legislative change ensures that there is an overall cap on the amount of damages recoverable between one employee and one employer on each injury.

28. 727 N.E.2d 1084 (Ind. Ct. App. 2000).

29. *See id.* at 1085-86.

30. The Act provides compensation for employees who suffer injuries that occur "by accident arising out of and in the course of employment." IND. CODE § 22-3-2-5 (1998).

31. *See Clemans*, 727 N.E.2d at 1091.

32. *Id.* at 1086 (citing *K-Mart Corp. v. Novak*, 521 N.E.2d 1346, 1348 (Ind. Ct. App. 1988)).

33. *See, e.g., Reed v. Brown*, 152 N.E.2d 257, 259 (Ind. Ct. App. 1958).



Act to those accidents which occur during the employee's ingress to or egress from their employer's operating premises or extensions thereof. Prior to *Clemans*, it had been held that employer-controlled parking lots or private drives used solely by employees were extensions of the employer's operating premises for purposes of coverage under the Act.<sup>34</sup>

Clearly, had *Clemans'* injuries occurred on the employer provided parking lot, Wishard would have accepted *Clemans'* worker's compensation claim as compensable. However, the unique issue presented was whether Wishard should be responsible for injuries occurring on a public street over which they exercise no ownership or control, particularly when they provided alternative means of travel which would have eliminated the risk undertaken by *Clemans*.

The court ultimately disagreed with Wishard, basing its decision almost entirely upon its decision in *Reed v. Brown*.<sup>35</sup> In *Reed*, the employer's property was subject to an operating easement of a railroad company; thus, railroad tracks ran through and divided the employer's operating premises. There were means of access to the building where the employee worked, one where no flasher signals were posted at the point where the private driveway crossed the tracks, and another with flasher signals. The employee was driving to work using the private driveway and crossed the tracks at the point with no flasher signals. He was struck by an oncoming train. In determining that *Reed's* accident 'arose out of' and 'in the course of' his employment, the court noted that premises not only "'include premises owned by the employer, but also those premises leased, hired, supplied or used by [the employer/employee.]"<sup>36</sup> The private driveway over the tracks afforded a shorter, quicker and more convenient route to and from the employment and, thus, the court found that the employer had implicitly authorized or permitted the employee to travel such route.<sup>37</sup>

The *Clemans* court reasoned that,

[j]ust as the employee in *Reed* was subjected to an incidental risk every time he crossed the railroad tracks to access the building where he worked, so too was *Clemans* subjected to an incidental risk every time she crossed Wilson Street to access the vehicle which brought her to work in the first place.<sup>38</sup>

In this author's opinion, the difference is necessity. In *Reed*, the employee would have been required to cross the railroad tracks regardless of which path the employee choose. Clearly, one path appeared safer due to the existence of cautionary lights. However, the employee nonetheless had to cross the railroad tracks at one of those two points, thus subjecting himself to an incidental risk of employment. In *Clemans*, however, it was not necessary for the employee to

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34. See, e.g., *Lawhead v. Brown*, 653 N.E.2d 527, 529 (Ind. Ct. App. 1995); *U.S. Steel Corp. v. Brown*, 231 N.E.2d 839, 842 (Ind. Ct. App. 1967).

35. *Reed*, 152 N.E.2d at 257.

36. *Id.* at 261 (citations omitted).

37. See *id.* at 260-63.

38. *Clemans*, 727 N.E.2d at 1088.



cross the public street; instead, she could have traveled the tunnel, thereby eliminating the incidental risk all together.<sup>39</sup> Unfortunately for employers, the court of appeals did not agree.

Thus, in an expansive decision, the court of appeals extended the ingress/egress doctrine to include not only the logical extensions of an employer's operating premises, such as a private drive or an employer-provided parking lot, but also to any publically owned and controlled area situated between the actual place of employment and logical extensions of the employer's operating premises. The practical result may be a chilling effect on employer-provided parking as a benefit if, indeed, access to the provided parking requires an employee to cross a public street.

### III. INDIANA SUPREME COURT RULES ON *SPANGLER, JENNINGS & DOUGHERTY P.C. v. INDIANA INSURANCE CO.*

Since 1998, practitioners have eagerly awaited the Indiana Supreme Court's decision in *Spangler, Jennings & Dougherty P.C. v. Indiana Insurance Co.*,<sup>40</sup> a decision construing Indiana Code section 22-3-2-13. Through Indiana Code section 22-3-2-13, the Act provides if an employee's injuries are caused by someone other than the employer or a co-employee, the injured worker may maintain a civil action against that party. If the employee recovers from the third party, then the Act provides that the employer or worker's compensation carrier may receive reimbursement for the amount of compensation benefits and medical expenses paid on behalf of the employee.<sup>41</sup> The employer or worker's compensation carrier, must, however, pay a pro-rata share of litigation costs and expenses as well as a statutory fee to the employee's attorney.<sup>42</sup> Once judgment or settlement has been reached in the third party suit, an employer's obligation to provide benefits ceases.<sup>43</sup>

The *Spangler* decision addressed the issue of the employer's pro-rata share of the employee's attorney's fees. Specifically, the issue presented was whether the employer or carrier owe a pro-rata share of attorney fees on only the amount of the lien collected by the employee's attorney or, instead, whether it also owes its pro-rata share of attorney's fees on the amount it would have continued to pay in future benefits but for the existence of a third party recovery. The court of appeals held that the employer or worker's compensation carrier must contribute a pro-rata share of attorney's fees on the entire amount of the award including that amount of future benefits it would have paid but for the third-party recovery.<sup>44</sup>

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39. *See id.*

40. 729 N.E.2d 117 (Ind. 2000).

41. *See* IND. CODE § 22-3-2-13 (1998).

42. *See id.*

43. *See id.*

44. *See Spangler, Jennings & Dougherty P.C. v. Ind. Ins. Co.*, 685 N.E.2d 705, 707 (Ind. Ct. App. 1997), *rev'd*, 729 N.E.2d 117 (Ind. 2000).



On transfer to the Indiana Supreme Court, the court reversed and vacated the court of appeals' decision. The court noted that the language of the statute, when discussing third-party settlement without suit, stated that, "benefits shall consist of the amount of reimbursements."<sup>45</sup> When the statute discusses third-party settlement collected with suit, the statute also references benefits but fails to utilize the same language. The court nonetheless concluded that the "term 'benefits' discussed in the 'with suit' situation has the same meaning as the 'benefits' defined earlier in that very same sentence (in the 'without suit' situation)."<sup>46</sup> The court stated, "[w]hether the claim is resolved with or without suit, the benefits are the same: reimbursements."<sup>47</sup>

The Indiana General Assembly seems to be in agreement with the *Spangler* decision given the recent legislative amendment to Indiana Code section 22-3-2-13. During the last session, the legislature clarified Indiana Code section 22-3-2-13 to provide for reimbursements

actually repaid after the expenses and costs in connection with the third party claim have been deducted therefrom, and a fee of thirty-three and one-third percent (33 1/3%), if collected with suit, of the amount of benefits actually repaid after deduction of costs and reasonably necessary expenses in connection with the third party claim action or suit.<sup>48</sup>

The legislative change was likely a reaction to the court of appeals' interpretation in *Spangler* and thus an attempt to limit the attorneys' fees to the amount of benefits that have actually been paid to date, and to exclude from that calculation potential future benefits that have been avoided.

#### IV. WORKPLACE VIOLENCE

In *Conway ex. rel. Conway v. School City of East Chicago*,<sup>49</sup> the employee was employed as a school bus driver by the School City of East Chicago. The job required the drivers to park their buses in the Central Services Facility when not transporting children. At this facility, there was a gatehouse from which another employee would control the opening and closing of the facility gate. On April 7, 1995, employee Harris was working at the facility gatehouse when he shot and killed employee Conway. Immediately prior to the shooting, Harris began running towards Conway's vehicle. Using vile language, he stated, "[h]e was the one that caused my problem."<sup>50</sup> Conway's surviving spouse argued for entitlement to worker's compensation benefits on the premise that but for the requirement of Conway's job, he would not have had to pass through the security

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45. *Spangler*, 729 N.E.2d 117 at 122.

46. *Id.* (citing IND. CODE § 22-3-2-13 (1991)).

47. *Id.*

48. IND. CODE § 22-3-2-13 (1998).

49. 734 N.E.2d 594 (Ind. Ct. App. 2000).

50. *Id.* at 596.



gate and would not have been shot. Thus, she argued that Conway's death arose out of and in the course of his employment.<sup>51</sup>

The Single Hearing Member and the Full Board both denied Conway's claim for worker's compensation benefits. In holding that the death did not arise out of and in the course of the decedent's employment, the Hearing Member found "(1) that the evidence fail[ed] to disclose that Decedent's death arose out of some work-related risk . . . (2) that there [was] no evidence to connect the employment conditions and the resulting death . . . (3) that the evidence show[ed] that [Harris] had a prior animosity toward the decedent."<sup>52</sup> The Full Board affirmed, and Conway appealed.

On appeal, Conway pointed to evidence that the decedent came into daily contact with Harris at the facility gate and that Harris had been disciplined by the employer for becoming agitated at another bus driver who drove past the gate without showing Harris respect. Conway argued that these facts are sufficient to show that the animosity between the two employees was work related. The court of appeals, mindful of its standard of review,<sup>53</sup> declined to reweigh the evidence and instead found that the evidence presented to the Full Board was sufficient for the Board to conclude that a personal conflict, unrelated to work, existed between Conway and Harris.<sup>54</sup>

Conway next argued that the Board erred in applying the law to the findings. Specifically, he argued that the Board failed to apply the correct test in determining whether the requisite causal relationship existed between the decedent's death and his work. Conway urged the court to apply the positional risk test. This test is applied if the risk appears to be neutral. For example,

cases of stray bullets, roving lunatics, and other situations in which the only connection of the employment with the injury is that its obligations placed the employee in a particular place at a particular time when he was injured by some neutral force, meaning *neutral* neither personal to the claimant nor distinctly associated with the employment.<sup>55</sup>

If a positional risk test applies, then an injury arises out of the employment if it would not have occurred but for the fact that the employment placed claimant in a position where he was injured.<sup>56</sup> The court, however, found that the risk involved in *Conway* was not neutral because the evidence showed that Harris had personal animosity toward the decedent unrelated to work. The court opined that this finding made Conway's case subject to the increased risk analysis as

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51. See *id.* at 596-97.

52. *Id.* at 597.

53. On appeal, the court must disregard all evidence unfavorable to the Board's decision and examine only that evidence and the reasonable inferences therefrom that support the Board's conclusion. See *Four Star Fabricators, Inc. v. Barrett*, 638 N.E.2d 792, 794 (Ind. Ct. App. 1994).

54. See *Conway*, 734 N.E.2d at 598.

55. *Id.* at 599 (quoting *K-Mart Corp. v. Novak*, 521 N.E.2d 1346, 1349 (Ind. Ct. App. 1998)).

56. See *id.*



opposed to the positional risk analysis advanced by Conway.<sup>57</sup>

Under the increased risk analysis, a causal nexus exists between the injury and the employment when "a rational mind might comprehend that the accident was a risk incidental to the employment."<sup>58</sup> The court noted that as a general rule, "a risk is incidental to the employment if the risk involved is not one to which the public at large is subjected."<sup>59</sup> Under an increased risk analysis, there is no causal nexus when the injury arises from a personal conflict unrelated to work - such as the conflict in this case.<sup>60</sup> In support of its conclusion, the court noted prior decisions discussing workplace violence wherein worker's compensation benefits had been denied based on the same analysis. For example, in *Peavler v. Mitchell & Scott Machine Co.*,<sup>61</sup> an ex-boyfriend came to his ex-girlfriend's place of employment and shot her while she was in the course of her employment. The court in *Peavler* held that harms arising from personal risks are universally noncompensable.<sup>62</sup> The *Conway* court applied a similar analysis and concluded that the personal risk to which Conway was exposed was not incidental to his employment "because the public at large is also subjected to that same risk of being attacked for personal reasons on a daily basis, regardless of where they are employed."<sup>63</sup>

## V. OTHER LEGISLATIVE CHANGES

In addition to the legislative changes noted above, the General Assembly amended the Act to provide benefits for time missed at work due to medical treatment and amended the Act's definition of corporate employers.

### A. *Lost Wages for Time Missed at Work due to Medical Treatment*

Indiana Code sections 22-3-3-4 and 22-3-7-17, which deal with the payment of reasonable and necessary medical expenses, were amended to include the following new language: "[i]f the treatment or travel to or from the place of treatment causes a loss of working time to the employee, the employer shall reimburse the employee for the loss of wages using the basis of the employee's average daily wage."<sup>64</sup> This change does not refer to payment of wages based on the temporary total disability rate, but rather, it is based on the "employee's average daily wage."<sup>65</sup> While many employers will pay wages to an employee while in treatment for a work injury during the standard work day, if the employer does not do so, it is now apparently the worker's compensation

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57. *See id.*

58. *Id.*

59. *Id.* (quoting *K-Mart Corp.*, 521 N.E.2d at 1348).

60. *See id.*

61. 638 N.E.2d 879 (Ind. Ct. App. 1994).

62. *See id.* at 881.

63. *Conway*, 734 N.E.2d at 599.

64. IND. CODE §§ 22-3-3-4(a), 22-3-7-17(a) (Supp. 2000).

65. *See id.*



carrier's duty to do so. Of course there is still the option of requiring that all medical treatment be scheduled outside of the normal work hours of the employee, if possible.

### *B. Definitions of Corporate Employers*

Indiana Code section 22-3-6-1 includes definitions of terms within the Act. In the last session, the legislature amended the definition of an employer as follows:

"Employer" includes the state and any political subdivision, any municipal corporation within the state, any individual or the legal representative of a deceased individual, firm, association, limited liability company, or corporation or the receiver or trustee of the same, using the services of another for pay. A parent or a subsidiary of a corporation or a lessor of employees shall be considered to be the employer of the corporation's, the lessee's, or the lessor's employees for purposes of IC 22-3-2-6.<sup>66</sup>

In addition, Indiana Code section 22-3-7-9 was amended to read:

As used in this chapter, "employer" includes the state and any political subdivision, any municipal corporation within the state, any individual or the legal representative of a deceased individual, firm, association, limited liability company, or corporation or the receiver or trustee of the same, using the services of another for pay. A parent or a subsidiary of a corporation or a lessor of employees shall be considered to be the employer of the corporation's, the lessee's, or the lessor's employees for purposes of section 6 of this chapter.<sup>67</sup>

These changes are presumably in response to *McQuade v. Draw Tite, Inc.*,<sup>68</sup> wherein the Indiana Supreme Court held that if a Corporation attempts to distance itself from its subsidiary through the corporate structure, it cannot then claim the benefit of the exclusive remedy provision and avoid civil liability for the injuries of an employee of the subsidiary.<sup>69</sup> While it is not clear that the language drafted and approved by the legislature will have the effect of protecting a corporation against separate civil liability, it appears that was the intent of the legislature.

### CONCLUSION

The Act forges a compromise between employers and employees by allowing employees to recover benefits without having to show fault on the part of the employer. With each passing year, the legislature makes changes to this so-

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66. IND. CODE § 22-3-6-1(a) (Supp. 2000).

67. *Id.* § 22-3-7-9(a).

68. 659 N.E.2d 1016 (Ind. 1995).

69. *See id.* at 1020.



called compromise and the courts interpret and clarify the boundaries of this compromise. As this Article demonstrates, this survey period was no different. Indiana practitioners should look forward to new developments in 2001.







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## ARTICLE

### THE GUILTY PLEA PROCESS IN INDIANA: A PROPOSAL TO STRENGTHEN THE DIMINISHING FACTUAL BASIS REQUIREMENT

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#### INTRODUCTION

Considering the numerous high profile jury trials as well as the fictional yet compelling jury trial scenes from movies and television, it is understandable that Indiana citizens may have an inaccurate perception of the frequency of jury trials in criminal cases. In addition to the media and popular entertainment, however, the public's failure to appreciate that the overwhelming majority of cases in Indiana criminal courts are resolved by way of an uncontested guilty plea is attributable in some measure to the legal system itself. Hailing the jury trial as the scrupulous protector of the rights of the individual and as the cherished means to truth and justice, the legal system often links its legitimacy and credibility to the full fledged adversarial process. The purported sanctity of the jury trial process is further underscored by scholars who rail against the prevalence of plea bargaining and the diminishing numbers of jury trials in the American criminal justice system.<sup>1</sup>

Although the public's misconception about the manner in which Indiana criminal courts go about the business of resolving cases is unfortunate, it is submitted that the legal system's acquiescence in the illusion of the jury trial as the dominant dispositional method in criminal cases is more significant and troubling. It can be argued that in view of the scarcity of jury trials and the frequency of guilty pleas, the legal system has focused disproportionate attention on the former and failed to consistently and legitimately address the latter to the detriment of both the interests of the individual defendants and the proper

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1. See, e.g., Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983); John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL'Y 119 (1992); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984).



administration of justice.

The purpose here is neither to rue the demise of the adversarial process by advocating a prohibition against guilty pleas generally or plea bargaining specifically<sup>2</sup> nor to propose that the American adversarial process should be critically re-evaluated in relation to the inquisitorial approach of the countries of continental Europe.<sup>3</sup> Attention will be directed in this Article to the guilty plea process as it actually functions with particular focus on the guilty plea factual basis requirement. It will be argued that the factual basis requirement is inconsistently implemented in the trial and appellate courts to the point of constituting a threat both to the due process rights of individual defendants and the interests of the fair and efficient administration of justice.

This Article sets forth a proposal to fortify the factual basis requirement by mandating a clear and consistent procedure for Indiana judges in establishing a factual basis for a plea of guilty. As part of the proposal to strengthen the factual basis requirement, an Indiana trial court judge, in limited circumstances, should be authorized to permit a defendant to enter a best interests plea pursuant to the United States Supreme Court case of *North Carolina v. Alford*.<sup>4</sup> The Article will conclude with a delineation of the matters that may be legitimately left to the discretion of the trial court and the matters that should be standardized and required of the trial court judge in establishing a factual basis for a guilty plea or a best interests plea.

## I. IMPORTANCE OF THE JURY TRIAL—PREVALENCE OF THE GUILTY PLEA

It has been noted that "[t]he right to jury trial in criminal cases was among the few guarantees of individual rights enumerated in the Constitution of 1789, and it was the only guarantee to appear in both the original document and the Bill of Rights."<sup>5</sup> In addition to the jury trial guarantee in the United States Constitution, the Indiana Constitution of 1851 provides: "In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury . . ."<sup>6</sup> Indiana has underscored the importance of the right to a jury trial in another constitutional provision: "In all criminal cases whatever, the jury shall

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2. For an excellent review of the "plea bargaining" debate, see Colloquy, *Special Issue on Plea Bargaining*, 13 LAW & SOC'Y REV. 189 (1979). See also Douglas D. Guidorizzi, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753 (1998).

3. See Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539 (1990); John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979).

4. 400 U.S. 25 (1970).

5. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870 (1994) (citations omitted).

6. IND. CONST. art. 1, § 13(a).



have the right to determine the law and the facts.”<sup>7</sup>

The apparent significance of jury trials is further illustrated by a cursory review of the multiple provisions relating to trials contained in the Indiana Code and the various Indiana Supreme Court Rules<sup>8</sup> as well as the reported decisions from the supreme court and court of appeals. Although the disproportionate attention to trial issues in reported decisions by the Indiana appellate courts may be explained in part by the fact that a guilty plea in Indiana constitutes a waiver of the defendant’s general right to appeal, the abundant attention to trial procedure in criminal cases is hardly debatable.

The systemic commitment to the jury trial process can be observed in the actions of numerous trial court judges who meticulously manage their jury trial calendar by lamenting the burden of a busy trial docket yet disregarding the fact that so few cases actually proceed to jury trial. Trial court judges make certain the defendant’s right to a jury trial is honored by concerning themselves with issues as mundane as jury room facilities and as tedious as jury instructions. The purpose here, however, is not to quarrel with the honored place of the jury trial in the American legal system. From its roots in England, there is little serious doubt about the American criminal jury trial as a fundamental precept of our legal heritage. The right to a jury trial in America pre-dates the Constitution, the Declaration of Independence, and even the first English settlement on this continent.<sup>9</sup> Further, the over-arching public benefit of the jury trial process in affording direct citizen participation as a check against government excess should not be minimized.

The significance and importance of the constitutional guarantee of criminal jury trials must be viewed in the context of the ultimate goal of protecting the rights of the individual and the interests of society as a whole. Whether it be a full-fledged adversarial trial or a quasi-adversarial proceeding in which some or all of the potential issues are uncontested, the legal process must be the means to achieve the ultimate ends of justice. Thus, substance must trump form in order to protect the constitutional rights of the individual, no matter what stage of the process.

Although observers and commentators may posit that justice is best assured through the widespread use of contested proceedings such as jury trials, the reality of the present system demands a more practical approach. Trial court judges faced with limited resources and an ever-increasing caseload would, no doubt, welcome additional funding and staffing, yet these judges know that society cannot provide the resources necessary to ensure trial-type proceedings in all criminal cases. Furthermore, the United States Supreme Court has noted that:

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7. IND. CONST. art. 1, § 19.

8. See, e.g., INDIANA RULES OF EVIDENCE; INDIANA RULES OF CRIMINAL PROCEDURE; INDIANA RULES OF TRIAL PROCEDURE (applicable to all civil actions and to criminal cases unless the supreme court has enacted a conflicting criminal rule) (see IND. R. CRIM. P. 21).

9. See Alschuler & Deiss, *supra* note 5, at 870.



The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.<sup>10</sup>

Considering both the United States Supreme Court imprimatur on the plea bargaining process and the prevalence of guilty pleas with or without plea bargaining, it is disingenuous to argue that the efficacy and legitimacy of the criminal justice system is or should be inextricably intertwined with the complete jury trial. Instead, the criminal justice system should attempt to improve the guilty plea process.

The infrequency of criminal jury trials in Indiana trial courts is proven by the 1998 Indiana Judicial Report compiled and published by the Indiana Supreme Court Division of State Court Administration. The report notes that Indiana criminal courts disposed of 246,142 felonies and misdemeanors in 1998 with 1810 of those dispositions (less than one percent) occurring by way of jury trial, 14,060 (5.7%) by bench trial, 139,516 (fifty-seven percent) by guilty plea, and 80,984 (thirty-three percent) by dismissals.<sup>11</sup> Considering felonies and misdemeanors separately, there were 51,266 felonies disposed of with 1510 (2.9%) dispositions by way of jury trial, 1930 (3.8%) by way of bench trial, 35,867 (seventy percent) by way of guilty plea, and 10,058 (twenty percent) dismissed.<sup>12</sup> There were 194,876 misdemeanors disposed of in 1998 with 300 dispositions (less than one percent) by way of jury trial, 12,130 (6.2%) by bench trials, 103,649 (fifty-three percent) guilty pleas and 70,926 (thirty-six percent) through dismissals.<sup>13</sup>

Statistics from other jurisdictions demonstrate the lack of jury trials throughout the American criminal justice system. For example, in the U.S. district courts there were 59,885 defendants convicted and sentenced in 1998 and 56,256 (approximately ninety-four percent) of the dispositions were by way of a plea of guilty or nolo contendere.<sup>14</sup> Further, for felony convictions in state courts, guilty pleas accounted for approximately ninety-one percent of the dispositions while jury trials accounted for four percent and bench trials

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10. *Santobello v. New York*, 404 U.S. 257, 260 (1971).

11. See INDIANA SUPREME COURT DIVISION OF STATE COURT ADMINISTRATION, 1998 INDIANA JUDICIAL REPORT Vol. 1, at 55, 57-61 (1999) [hereinafter 1998 INDIANA JUDICIAL REPORT].

12. See *id.* at 58-61.

13. See *id.*

14. See BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1998, at 407 (Kathleen Maguire & Ann L. Pastore eds., 1999) [hereinafter SOURCEBOOK].



accounted for five percent.<sup>15</sup>

It should be noted that the Indiana Judicial Report cautions that the report is not designed to be "a complete detailing of every judicial decision."<sup>16</sup> The statistics are derived from the Quarterly Case Status Reports (QCR) completed and submitted by every Indiana trial court, and the dispositional categories listed on the QCR are subject to some question and interpretation.<sup>17</sup> However, as demonstrated by the new dispositional category entitled "Bench Disposition" to be reported in calendar year 2000, most interpretation issues center on dispositions other than jury trials where a jury is seated and evidence is received.<sup>18</sup>

Due to the various Indiana statutes that authorize the court or the prosecuting attorney to dismiss, divert or conditionally defer various types of cases prior to the entry of conviction, a number of "dismissed cases" actually are more akin to guilty plea dispositions. The case is not dismissed until the defendant successfully completes a period of rehabilitation with some degree of supervision. In fact, when a guilty plea at a court appearance precedes the diversion or deferral and ultimate dismissal, the specific dispositional method may be reported differently by individual judges or court administrators. It is also possible that the numerous statutory diversions and deferrals may account for a relatively high dismissal rate of approximately twenty percent for felonies in Indiana courts (the dismissal rate for misdemeanors is even higher at thirty-six percent) as compared to a felony dismissal rate of approximately ten percent for the U.S. district courts.<sup>19</sup> Yet even if the statistics on criminal case dispositions in Indiana are discounted for potential reporting and interpretation errors, it remains beyond dispute that a relatively small number of criminal cases are disposed of through contested jury or bench trials. Conversely, the clear majority of criminal cases are concluded by means of a guilty plea offered by the defendant.

## II. AN OVERVIEW OF INDIANA CASES AUTHORIZING A GUILTY PLEA

Considering the frequency of guilty pleas, one might intuitively expect the process to be of such long-standing tradition that little of the procedure would be subject to debate or discretion. Guilty pleas have been recognized for many years as a legitimate part of the American (and Indiana) criminal justice system, yet the process has been neither stagnant nor standardized to the exclusion of discretion or debate. As to the origin of the guilty plea in Anglo-American common law, Professor Alschuler indicates that:

From the earliest days of the common law, it has been possible for

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15. *See id.* at 432.

16. 1998 INDIANA JUDICIAL REPORT, *supra* note 11, at 1.

17. *See id.*

18. *See id.* at 40.

19. *See* SOURCEBOOK, *supra* note 14, at 407; *see also* 1998 INDIANA JUDICIAL REPORT, *supra* note 11, at 55, 60.



an accused criminal to convict himself by acknowledging his crime. "Confession" was in fact a possible means of conviction even prior to the Norman conquest. Nevertheless, confessions of guilt apparently were extremely uncommon during the medieval period.<sup>20</sup>

Professor Alschuler also notes that the earliest reported American decision in a guilty plea case was *Commonwealth v. Battis*,<sup>21</sup> an 1804 Massachusetts case, although the 1892 case of *Hallinger v. Davis*<sup>22</sup> was the first United States Supreme Court opinion to uphold a guilty plea conviction entered in a United States district court.<sup>23</sup>

In Indiana, the guilty plea process was sanctioned by the Indiana Supreme Court in various reported cases at least twenty years prior to 1892. For example, in an 1871 case in which the defendant challenged the trial court's denial of the request to withdraw a guilty plea, the supreme court upheld the trial court's denial of the request by noting:

Upon a plea of guilty, . . . the court has nothing to do but to fix the amount of punishment and render judgment or sentence accordingly. There is nothing for the court to find. The prisoner, by his confession, has made a finding unnecessary. The court may take the prisoner at his word, and proceed accordingly.<sup>24</sup>

In a cautionary note, the supreme court added:

Mr. Blackstone, in his Commentaries, says: "The other incident to arraignments, exclusive of the plea, is the prisoner's actual confession of the indictment. Upon a simple and plain confession, the court hath nothing to do but to award judgment; but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract it, and plead to the indictment."<sup>25</sup>

In a case from the November 1882 term, the Indiana Supreme Court overturned a guilty plea to murder entered by a defendant upon advice of counsel because of the danger from a "lynch mob."<sup>26</sup> In overturning the "plea of confession" and ordering the reinstatement of a not guilty plea, the supreme court

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20. Albert W. Alschuler, *Plea Bargaining and Its History*, 13 LAW & SOC'Y REV. 211, 214 (1979) (internal citations omitted).

21. 1 Mass. 95 (1804).

22. 46 U.S. 314 (1892).

23. See Alschuler, *supra* note 20, at 214-15.

24. Griffith v. State, 36 Ind. 406, 408 (1871).

25. *Id.* at 408-09 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*329).

26. See Sanders v. State, 85 Ind. 318 (1882). Defendant, who reportedly was addicted to alcohol and opium to the extent that he may have become insane, was charged with murder when he could not explain the death of his wife who was killed by a pistol shot while in a room alone with the defendant. See *id.*



found that a guilty plea extorted by duress, as in this case, must be held for naught.<sup>27</sup> In another late nineteenth century case, the Indiana Supreme Court recognized the validity of a guilty plea by noting that a valid guilty plea constituted jeopardy barring the refiling of the criminal charge upon dismissal by the prosecutor after the guilty plea was entered and accepted by the court but prior to sentencing.<sup>28</sup>

In what appears to be one of the first Indiana Supreme Court cases to directly address a guilty plea offered in the context of a "plea bargain," the Indiana Supreme Court found that the trial court judge had abused his discretion in refusing to set aside the guilty plea and reinstate a not guilty plea for a defendant who had pleaded guilty on the day of his arraignment.<sup>29</sup> The defendant, who had been in custody for approximately thirty days prior to the return of the indictment for grand larceny (horse theft), pleaded guilty without consulting an attorney after having discussed the matter with the sheriff who had advised the defendant that the prosecutor agreed that upon a guilty plea, the punishment should not exceed two years.<sup>30</sup> Immediately following the guilty plea the judge sentenced the defendant to a ten-year prison term and the next morning denied the request to set aside the judgment and grant leave to withdraw the guilty plea.<sup>31</sup> The supreme court, in finding that the defendant should have been allowed to withdraw his guilty plea because the defendant was misled by the conversations with the sheriff, found support from other jurisdictions: "Courts have always been accustomed to exercise a great degree of care in receiving pleas of guilty, in felonies, to see that the prisoner has not made his plea by being misled, or under misapprehension, or the like."<sup>32</sup>

In a 1915 case reversing the judgment of the trial court, which had refused to allow the defendant to withdraw his guilty plea (the defendant was a Russian-speaking Austrian who pleaded guilty through an interpreter without an attorney), the Indiana Supreme Court noted: "That a plea of guilty should be entirely voluntary, and made by one competent to know the consequences thereof, and that the trial court should satisfy itself of these facts before receiving it, appears to be well settled."<sup>33</sup> The defendant was neither represented by counsel nor given a full explanation of the consequences of the plea of guilty; thus, the plea would not stand.<sup>34</sup>

An increasing number of guilty plea cases were considered by the Indiana Supreme Court after the turn of the century and most of those cases revolved around the issues of voluntariness and whether the defendant understood the

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27. *See id.* at 320.

28. *See Boswell v. State*, 11 N.E. 788, 789 (Ind. 1887).

29. *See Myers v. State*, 18 N.E. 42 (Ind. 1888).

30. *See id.* at 42-43.

31. *See id.* at 42.

32. *Id.* at 44.

33. *Mislik v. State*, 110 N.E. 551, 552 (Ind. 1915) (citations omitted).

34. *See id.* at 553 (the interpreter was a police officer who had assisted in the arrest of the defendant).



consequences of his actions, with particular attention to the availability of counsel.<sup>35</sup> In a case decided in 1920, the supreme court made it clear that a defendant could waive the rights guaranteed by the Bill of Rights of the Indiana Constitution<sup>36</sup> even when facing a capital offense of murder in the first degree, so long as the defendant makes the plea with full knowledge of his rights and the consequences of the plea.<sup>37</sup> The guilty plea in this case was set aside, however, because the defendant had not been advised of all the consequences of his guilty plea and he was not given an opportunity to consult with an attorney prior to the plea.<sup>38</sup>

The supreme court issued an extremely significant case in 1953, commenting on the guilty plea process, stating:

Under our practice an accused may enter a plea of guilty in any case, and thereby waive his constitutional right to trial by jury. But to be valid and binding upon the accused, such a plea must be made by the accused intelligently, advisedly and understandingly, with full knowledge of his rights, and with the considered approval of the judge before whom he stands charged.<sup>39</sup>

However, the court noted that a guilty plea

should not be accepted from one who does not know, or who, at the time of arraignment, asserts that he does not know, whether or not he has committed the crime charged, for such would be entirely incompatible with the idea of an admission of guilt, and wholly inconsistent with the due administration of justice.<sup>40</sup>

In language foreshadowing the factual basis requirement, which would become part of the required guilty plea process approximately twenty years later, the supreme court opined:

[A] plea of guilty tendered by one who in the same breath protests his innocence, or declares he actually does not know whether or not he is guilty, is no plea at all. Certainly it is not a sufficient plea upon which to

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35. See, e.g., *Ketring v. State*, 200 N.E. 212 (Ind. 1936); *Rhodes v. State*, 156 N.E. 389 (Ind. 1927).

36. See IND. CONST. art. I, § 13(a):

In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor.

*Id.*

37. See *Batchelor v. State*, 125 N.E. 773, 776 (Ind. 1920).

38. See *id.*

39. *Harshman v. State*, 115 N.E.2d 501, 502 (Ind. 1953).

40. *Id.*



base a judgment of conviction. No plea of guilty should be accepted when it appears to be doubtful whether it is being intelligently and understandingly made, or when it appears that, for any reason, the plea is wholly inconsistent with the realities of the situation.<sup>41</sup>

In 1972, the Indiana Supreme Court handed down *Brimhall v. State*,<sup>42</sup> another extremely significant guilty plea case in which the court quoted with approval from the U.S. Supreme Court case of *Brady v. United States*:<sup>43</sup>

That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the fifth amendment from being compelled to do so—hence the minimum requirement that his plea be the voluntary expression of his own choice. But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.<sup>44</sup>

The Supreme Court also noted with approval the draft of the American Bar Association Project on Minimum Standards for Criminal Justice, Pleas of Guilty, that specifically set forth the matters about which a defendant should be advised by the court upon a plea of guilty and addressed the factual basis as follows: "Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as may satisfy it that there is a factual basis for the plea."<sup>45</sup> The Indiana Supreme Court also discussed the U.S. Supreme Court case of *McCarthy v. United States*<sup>46</sup> which reversed a conviction because the trial court failed to comply with Rule 11 of the Federal Rules of Criminal Procedure to make certain the plea was voluntary and the defendant understood the nature of the charge and the consequences of pleading guilty.<sup>47</sup>

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41. *Id.*

42. 279 N.E.2d 557 (Ind. 1972).

43. 397 U.S. 742 (1970).

44. *Brimhall*, 279 N.E.2d at 563 (quoting *Brady*, 397 U.S. at 742).

45. *Id.* at 563 n.1 (quoting Minimum Standard 1.6).

46. 394 U.S. 459 (1969).

47. See *Brimhall*, 279 N.E.2d at 564. A factual basis became mandatory for a plea of guilty or nolo contendere in federal courts in 1966 through an amendment to Rule 11 of the Federal Rules of Criminal Procedure. See also John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?*, 126 U. PA. L. REV. 88, 111 (1977).



In 1973, the year following the *Brimhall* decision, the Indiana General Assembly enacted a provision requiring not only a determination by the judge that a guilty plea was entered voluntarily and with an understanding of the consequences of the action but also a determination that there was a sufficient factual basis for the plea of guilty.<sup>48</sup> Although there have been some changes since the 1973 enactment, the present statutory guilty plea process<sup>49</sup> remains essentially the same in that a plea of guilty must be voluntary, the defendant must understand and appreciate the consequences of his guilty plea<sup>50</sup> and there must be a factual basis for the plea of guilty.<sup>51</sup> It is the factual basis requirement which will be the focus of the remainder of this Article.

Since the enactment of the detailed statutory procedure regarding guilty pleas in 1973, the Indiana Supreme Court and the Indiana Court of Appeals have rendered several decisions regarding the guilty plea factual basis requirement. Although some of the decisions are confusing, if not inconsistent, a few general propositions have developed and can be stated with some degree of certainty.

Although the Indiana Code provides that the court may be satisfied that there is a sufficient factual basis for the guilty plea from either the court's examination of the defendant or the evidence presented,<sup>52</sup> it has been left to the appellate courts to determine the legitimacy of the variations on the two general approaches. For example, the judge may question the defendant regarding the offense or ask the defendant for a narrative regarding the charge, read the information and ask the defendant to admit to the charge or ask the defendant if he understands that a guilty plea is an admission to the truthfulness of the charges.<sup>53</sup> The judge may also allow the prosecutor as well as the defense lawyer to participate in the factual basis inquiry.<sup>54</sup> The supreme court has held:

Evidence used to illustrate factual basis may come from a variety of sources and is not limited to sworn testimony. The court may base its decision on its inquiry alone, so long as the questions presented are sufficiently detailed to show guilt. Questions requiring only a yes or no answer may be found insufficient. The court may also find factual basis from the State's detailed recitation of evidence on the elements of the crime and the defendant's admission thereto. Moreover, it may be shown through the testimony of witnesses who have personal knowledge of the defendant's conduct or admissions, . . . or the defendant's own

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48. See WILLIAM ANDREW KERR, INDIANA CRIMINAL PROCEDURE—TRIAL, PART I, 16A WEST INDIANA PRACTICE 209-10 (1998).

49. See IND. CODE §§ 35-35-1-2 to -4 (1998).

50. The record must demonstrate that the judge properly advised the defendant of various rights and options. See *id.* § 35-35-1-2.

51. See *id.* § 35-35-1-3.

52. See KERR, *supra* note 48, at 222.

53. See *id.*

54. See *id.*



sworn testimony.<sup>55</sup>

Other than affirming that Indiana law generally requires a factual basis for a valid guilty plea and sanctioning numerous methods by which the factual basis may be established, the Indiana Supreme Court and the Indiana Court of Appeals have not regularly and consistently addressed other substantive and procedural issues relating to the guilty plea factual basis requirement. The appellate courts have left the factual basis process to the wide ranging discretion of the trial court judge with appellate review on an ad hoc basis most often in the context of a Petition for Post Conviction Relief.

### III. A SAMPLING OF CURRENT GUILTY PLEA FACTUAL BASIS PROCEDURES

Recognizing the wide variety of authorized factual basis procedures coupled with the reality that many trial court procedures are never specifically addressed by an appellate court, several trial court judges were contacted by questionnaire regarding the method employed in establishing a factual basis.<sup>56</sup> The questionnaire was not designed as a scientific survey to yield data for statistical analysis but was an effort to obtain an informal sampling of present procedures and perceived problems. After the questionnaire was initially developed and submitted to the thesis committee members for comment and suggestions, two sitting judges were asked to review the questionnaire for comments and questions prior to distribution.

After some minor modifications based upon suggestions received, the questionnaire was distributed to approximately fifty judges (roughly fifteen percent of trial judges with criminal jurisdiction). In addition to every judge in Administrative District 13 (consisting of eleven counties in the southwest corner of the state), questionnaires were forwarded to judges in various parts of Indiana. Although distribution was not based on specific demographic factors because the purpose of the survey was merely to obtain an informal sampling, a point was made to distribute questionnaires to judges from most geographic regions of the state including judges serving in urban areas (more likely to be high volume courts) as well as rural jurisdictions.

Part I of the questionnaire was designed to obtain information about the methods by which the factual basis is established. Part II was designed to elicit comments regarding factual basis issues or problems which may arise during the guilty plea process. It was candidly recognized that in addition to the restricted distribution of a relatively short survey, the amount of information might be further limited by a lack of enthusiasm (based on anecdotal evidence) that trial judges have for surveys. More significantly, it was recognized that limited responses and information might also result from a lack of interest in the subject underscored by the general failure of trial court judges to appreciate the significance of the issue.

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55. *Butler v. State*, 658 N.E.2d 72, 77 n.14 (Ind. 1995) (internal citations omitted).

56. A copy of the questionnaire and the accompanying cover letter in addition to the responses are on file with the author.



#### IV. RESULTS FROM PART I OF THE QUESTIONNAIRE

A total of thirty-six questionnaires were returned and the responses indicate that there are, indeed, a variety of factual basis procedures employed by Indiana trial court judges. Seven judges indicated that the factual basis process is conducted primarily by the judge, fourteen respondents indicated that the factual basis procedure is conducted primarily by the prosecutor, seven judges reported that the factual basis is primarily established by the defense attorney, and eight respondents advised that the factual basis resulted primarily from the combined efforts of the judge and the prosecutor.

Of the seven judges who responded that the factual basis process is conducted primarily by the judge, four indicated that the charging information is read to the defendant, who is asked to specifically admit the allegations with no other statement elicited from the defendant. One of the seven indicated that by pleading guilty the defendant is advised that he is admitting to the allegations of the offense, but the defendant is not required to specifically admit the allegations. Another judge indicated that the defendant is advised that the guilty plea is an admission to the allegations and the defendant is also required to specifically admit the allegations. Finally, one of the seven indicated that after the judge advises the defendant that by pleading guilty the defendant is admitting to the allegations, the defense attorney then asks questions of the defendant regarding the allegations.

Although a majority of the judges responding to the questionnaire indicated the factual basis process is conducted primarily by the prosecutor, there was considerable variation in the specific approaches. Five of the respondents indicated that in establishing the factual basis, the prosecutor reads the information to the defendant who is asked to admit to the allegations. However, only two of these respondents indicated that the process consists solely of reading the information to the defendant. One of the five indicated that in addition to reading the information, the prosecutor also outlines the evidence which would be presented at trial. The fourth respondent in this group reported that the prosecutor reads the information and also asks specific questions of the defendant regarding the allegations. The fifth judge in this group indicated that the prosecutor reads the information, outlines the evidence which would be presented at trial and asks specific questions regarding the allegations.

Five of the judges who responded that the factual basis process is conducted primarily by the prosecutor indicated that the prosecutor does not read the information to the defendant. Instead, the prosecutor outlines the evidence which would be presented at trial and then asks the defendant, under oath, to admit to the truth of the allegations. Two other judges, responding that the prosecutor outlines the evidence which would be presented at trial instead of reading the charging information, indicated that the prosecutor also asks specific questions of the defendant. Finally, two judges indicated that the prosecutor establishes the factual basis only by asking specific questions of the defendant.

Of the seven judges who reported that the factual basis is primarily established by the defense attorney asking questions of the defendant, two made



no mention of additional questioning by the prosecutor or the judge. The other five noted supplemental participation by the prosecutor and the judge. Eight judges indicated that the factual basis is primarily established by the combined efforts of the judge and prosecutor although none of the eight proceed in identical fashion. Seven of the respondents indicated that the judge reads the charging information, and one indicated that the information was read by the prosecutor. Of the seven judges who read the information to the defendant, two direct the prosecutor to ask questions of the defendant regarding the allegations. The other five judges direct the prosecutor to outline the evidence which would be presented at trial with the defendant then asked to confirm the accuracy of the allegations. Two of the judges also allow specific questioning of the defendant by the prosecutor and the defense attorney.

Indiana trial court judges use a variety of methods in addressing the statutorily required guilty plea factual basis. However, variation alone does not necessarily pose due process issues or systemic injustices in view of the wide discretion appellate courts grant to trial court judges. Part II of the questionnaire, however, is designed to address some of the potential problems in relation to the factual basis requirement.

#### V. PART II OF THE QUESTIONNAIRE

Question One of Part II<sup>57</sup> prompted a variety of responses from "no" (three respondents) to "often" to "ten to twenty percent, higher in misdemeanors." However, the clear majority of respondents indicated that confronting a defendant who refuses to establish a factual basis occurs on a relatively infrequent basis.

The responses to Question Two of Part II<sup>58</sup> indicated that trial court judges generally are willing to change the method of establishing the factual basis in order to accept a guilty plea, although it does not happen often. In fact, the frequency listed in answering Question Two mirrored the frequency listed in responding to Question One in almost fifty percent of the questionnaires. For example, the respondent who indicated that it was rare to be confronted with a defendant who wishes to plead guilty but is unwilling to establish a factual basis also responded that it was rare for the judge to change the method of establishing a factual basis. Although it cannot be known for certain, the similar frequency in responses to questions one and two may suggest that the judge changed the factual basis process whenever the judge was confronted with a defendant unwilling or unable to establish a factual basis.

Judges who noted they had never been confronted with a defendant unwilling to establish a factual basis indicated that they had, at least on occasion, changed the method of establishing a factual basis in order to accept a guilty plea.

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57. "Have you ever been confronted with a defendant who wishes to plead guilty but refuses to establish a factual basis?"

58. "Have you ever changed the method of establishing a factual basis in order to accept a guilty plea?"



Moreover, there were judges who indicated they had changed the method of establishing a factual basis more frequently than they had been confronted with a defendant unwilling to establish a factual basis. Apparently, these judges have learned of a potential problem with establishing a factual basis prior to or during a guilty plea hearing because there seems to be no other reason for a judge to modify procedure to accept a plea if the defendant was willing to establish the factual basis in the normal manner.

There were also some judges who indicated that they had been confronted with defendants unwilling to establish a factual basis, but these judges had never changed the method of establishing a factual basis. A few judges indicated that they had been more frequently confronted with defendants unwilling to establish a factual basis than occasions in which they had changed the method.

There does not seem to be a significant relationship (at least with the small sample obtained) between the manner in which the factual basis procedure is conducted and the likelihood or frequency of a defendant refusing to establish a factual basis or the likelihood or frequency of a judge changing the method of establishing the factual basis to accept a guilty plea. Although the factual basis process is primarily conducted by the judge, prosecutor, defense attorney, or a combination of the judge and prosecutor, this does not appear to impact the likelihood or frequency of a judge having confronted a defendant unwilling to establish a factual basis.

The responses to Question Three of Part II<sup>59</sup> provide the most surprising answers of the entire survey. Out of the thirty-six responses, only seven respondents indicated that they had accepted a guilty plea from a defendant suspected by the judge to be innocent of the charge. Of the positive responses, frequency estimates ranged from two out of hundreds, one a year, one to two a year, two to three a year, several a year and monthly.

The fact that a majority of responding judges do not suspect that innocent defendants will plead guilty is understandable to the extent that a conscientious judge concerned for the best interests of a defendant may not allow an innocent defendant to plead guilty. The U.S. Supreme Court has indicated that a criminal defendant does not have a constitutional right to plead guilty,<sup>60</sup> and perhaps the responding judges always exercise discretion in rejecting a guilty plea from a defendant suspected to be innocent. However, the responses may also imply that judges do not regularly suspect innocence in cases where a defendant is willing to admit to a crime. Finally, the numerous negative responses to Question Three are surprising in view of the answers to Question Five which, in some ways, address the same issue of guilty pleas by innocent defendants. Apparently, judges believe that although *they* do not do so, other judges accept guilty pleas from innocent defendants.

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59. "Regardless of the method employed in establishing a factual basis, have you accepted a guilty plea when you suspected a defendant was not guilty of the crime to which the defendant was pleading guilty?"

60. See *Lynch v. Overholser*, 369 U.S. 705 (1962).



Responses to Question Four<sup>61</sup> were quite consistent in that a majority of judges indicated they had never or only very infrequently rejected a guilty plea in spite of a sufficient factual basis when it was suspected that the defendant was innocent.<sup>62</sup> Other than one respondent who indicated that a guilty plea with a sufficient factual basis was rejected two to three times a month, other affirmative responses were coupled with frequency estimates ranging from very infrequently, very rare, rare, seldom, not often, one to two in career, one in three-and-a-half years, one in six years and two in six years. The infrequent rejection of a guilty plea because of suspected innocence would not be surprising if the occasion rarely arises.

As noted above, both Question Three and Question Five<sup>63</sup> were designed to address the issue of guilty pleas by innocent defendants. Apparently, some judges interpreted Question Five to relate only to cases before them, and others interpreted Question Five as a more general inquiry because some judges answered "no" to Question Three but "yes" to Question Five. Of course, interpretation may also explain why one judge responded "no" to Question Five indicating that the judge did not believe there were cases in which an innocent defendant pleads guilty, but then responded to Question Six by ranking in order of importance the various reasons innocent defendants plead guilty.<sup>64</sup>

Approximately one-third of the respondents indicated that they did not believe that there are cases in which an innocent defendant pleads guilty. However, the number of negative responses to Question Five was considerably smaller than the number of negative responses to Question Three. As previously noted, some judges apparently interpreted Question Five more generally than Question Three. It could be argued, however, that the opposite interpretation would be expected because Question Three left open the possibility that the defendant was only suspected not guilty, or was innocent of the charged crime but guilty of another crime, but Question Five referenced the innocent defendant. In any event, twenty-four judges indicated that innocent defendants do

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61. "Have you ever rejected a guilty plea in spite of a sufficient factual basis when you suspected a defendant to be not guilty of the crime to which the defendant sought to plead guilty?"

62. Incidentally, the infrequency of rejecting guilty pleas tends to diminish the efficacy of the potential explanation in question three as to why most judges indicated they had never accepted a guilty plea from a defendant suspected of innocence.

63. "Do you believe there are cases in which an innocent defendant pleads guilty?"

64. The five reasons offered as to why an innocent defendant may plead guilty were:

A. defendant desires to obtain the benefit of an attractive agreement with the prosecutor (dismissal of other charges or reduction of recommended sentence); B. defendant does not have an agreement with the prosecutor but expects or desires to obtain a reduced sentence from the judge; C. defendant desires to avoid the time, expense and uncertainty of fighting the charge (punishment on conviction is considered less burdensome than contesting the charge); D. defendant does not properly understand or appreciate the significance of pleading guilty; E. defendant is not guilty of the crime to which the defendant is pleading guilty but the defendant is guilty of some criminal conduct and seeks to avoid further attention or investigation from law enforcement.



occasionally plead guilty although almost none of the judges thought it was a frequent occurrence. Responses included: very rare, infrequent, rare, less than five, less than five percent, two a year, several a year and weekly but guilty of something.

As to ranking the reasons an innocent defendant pleads guilty, more than half of the respondents indicated that the most important reason for the occurrence is that the defendant desires to obtain the benefit of an attractive agreement with the prosecutor. On the other hand, one judge placed the desire to obtain the benefit of a bargain with the prosecutor as the least important factor, and two others ranked it as the second least important factor. The other respondents ranked the "prosecutor-plea agreement" factor as the most important or in the top three. Interestingly, four of the five factors were listed as the most important by at least one judge and every factor was listed as the least important factor by no less than one judge. The responses are varied to the point that other than the "prosecutor-plea agreement" factor being the most important, the desire to receive a reduced sentence from the judge, and the defendant not properly understanding or appreciating the significance of pleading guilty being approximately equal as the least important factors, few other generalizations are appropriate with the relatively small sample.

## VI. THE SIGNIFICANCE OF THE QUESTIONNAIRE RESPONSES

The responses are not offered as a scientific opinion poll or as necessarily reflective of the entire Indiana trial court bench. The questionnaire was designed to obtain a sampling of the variety, if any, of current procedures and opinions of Indiana trial court judges. Even a cursory review of the responses makes it apparent that there are a number of current approaches to the guilty plea factual basis requirement in Indiana. Although the divergent methods are not necessarily troubling in view of the great deal of discretion vested in the trial judge, the responses in Part II of the questionnaire cast a discomfiting shadow and raise potentially troubling issues regarding the lack of uniformity.

The lack of a mandatory and consistent guilty plea factual basis process allows trial judges to abdicate, consciously or otherwise, their responsibility to ensure that a plea of guilty is voluntarily made with full appreciation of the consequences of the action. Moreover, the wide discretion in establishing a factual basis also easily allows the trial judge to compromise, again, consciously or otherwise, the judge's role as a neutral voice within the criminal justice system interested in protecting both the rights of the individual defendant as well as the interests of society. Considering that there is legitimate accuracy inquiry required for a guilty plea and the prevalence of plea bargaining in the guilty plea process, the judge may serve as little more than an administrator supporting the systemic goal of the efficient processing of guilty defendants. A contested jury trial may be an infrequent interruption caused by the occasional defendant unwilling to plead guilty.

When a judge is advised that the prosecutor and defense attorney have reached an agreement on sentencing, the judge is presented with a clear opportunity to efficiently dispose of the matter through a resolution that avoids



the costly and time-consuming jury trial procedure. Promoting efficiency by deleting the determination of guilt from the process is particularly palatable if there is an assumption of guilt. If the trial judge even subconsciously assumes guilt, it is evident that the accuracy inquiry for a guilty plea becomes much easier to minimize, ignore or haphazardly address as a mere legal technicality.

When determining whether to accept a guilty plea, there are other significant considerations facing the trial judge, such as the overcrowded trial docket and the "speedy trial" problems resulting from the defendant's inability to post bond. To reject a plea agreement means that witnesses and victims will not be spared the burdens of trial, reluctant jurors will be required to report, and the overworked public defender will be responsible for trying the matter. These pressures, coupled with the defendant's apparent guilt, create little doubt that the trial judge may allow an expedited guilty plea process which has insufficient regard for the purported factual basis requirement.

The purpose here is not to cast undue criticism on the efforts of trial judges based on the relatively small sampling obtained from the narrowly focused questionnaire. Instead, it is submitted that the survey results simply point to a divergence in opinion and approach at the trial court level regarding the factual basis requirement, which underscores the contention that there has been a lack of meaningful and consistent guidance from the Indiana Supreme Court and the Indiana Court of Appeals on the matter since the factual basis requirement became part of Indiana law by legislative enactment in 1973.<sup>65</sup>

For example, a few years prior to the legislative enactment in which the factual basis requirement was inserted into the Indiana guilty plea process, the U.S. Supreme Court had held there is no constitutional requirement for a defendant to expressly admit guilt to be subjected to criminal punishment, specifically noting: "An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."<sup>66</sup> In 1973,<sup>67</sup> the Indiana Supreme Court in *Boles v. State*<sup>68</sup> appeared to sanction an "Alford-type best interests plea" when it held:

[W]here a guilty plea is accompanied with a protestation of innocence and unaccompanied by evidence showing a factual basis for guilt, the trial court should never accept it. But where, as in the case at bar, the plea is accompanied with overwhelming evidence of the defendant's guilt, the defendant is judicially advised of all the rights he is waiving, and the plea is voluntarily, freely, and knowingly given, then the

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65. See KERR, *supra* note 48, at 209.

66. North Carolina v. Alford, 400 U.S. 25, 37 (1970).

67. Although the factual basis requirement was not a statutory requirement until 1973, in 1972 the Indiana Supreme Court handed down the case of *Brimhall v. State*, which generally set forth the factual basis requirement provisions codified by the Indiana General Assembly. See *supra* notes 42-47 and accompanying text.

68. 303 N.E.2d 645 (Ind. 1973).



subjective motivation behind such plea shall not render it defective. Subsequent contentions of innocence arising during post-conviction relief proceedings are not sufficient, nothing more appearing, to attack a previously entered plea of guilty.<sup>69</sup>

Relying on *Boles*, the Indiana Supreme Court and the Indiana Court of Appeals upheld an "Alford-type plea" in several cases.<sup>70</sup>

Although the U.S. Supreme Court authorized so called "best interests pleas" in *Alford*, the Court stated that: "[T]he States may bar their courts from accepting guilty pleas from any defendants who assert their innocence."<sup>71</sup> After approximately ten years of allowing "Alford-type best interests pleas" as set forth in *Boles*, the Indiana Supreme Court in *Ross v. State*<sup>72</sup> revisited the issue and repudiated *Boles* to the extent that it had been interpreted to allow a guilty plea from a defendant who simultaneously asserts innocence.<sup>73</sup> *Boles* was also repudiated to the extent that it had been interpreted to overrule the 1953 *Harshman* case.<sup>74</sup> In a laudable effort to clearly state the law in Indiana regarding the factual basis requirement, the Indiana Supreme Court held in *Ross* that "as a matter of law, . . . a judge may not accept a plea of guilty when the defendant both pleads guilty and maintains his innocence at the same time. To accept such a plea constitutes reversible error."<sup>75</sup>

One might expect that such a direct and specific pronouncement of the law would effectively eliminate any confusion on the issue of the guilty plea factual basis, at least to the extent of best interests pleas. Furthermore, the supreme court seemed intent upon reviving the rationale of the *Harshman* case, which unmistakably provided that guilty pleas should be cautiously received and "a plea of guilty tendered by one who in the same breath protests his innocence, or declares he actually does not know whether or not he is guilty, is no plea at all."<sup>76</sup> Therefore, in specifically rejecting the "Alford best interests plea" of *Boles*, it would appear that the court expected the factual basis procedure, at a minimum, to ensure that defendants did not plead guilty without admitting to the charge. As later stated by the Indiana Supreme Court in *Butler v. State*,<sup>77</sup> the factual basis is designed to "ensure[] that a person who pleads guilty truly is guilty."<sup>78</sup>

The clarity and specificity of the law resulting from *Ross* did not last. In fact,

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69. *Id.* at 654.

70. See, e.g., *Campbell v. State*, 321 N.E.2d 560 (Ind. 1975); *Hitlaw v. State*, 381 N.E.2d 527 (Ind. App. 1978); *Likens v. State*, 378 N.E.2d 24 (Ind. App. 1978); *Brown v. State*, 322 N.E.2d 98 (Ind. App. 1975).

71. *Alford*, 400 U.S. at 38 n.11.

72. 456 N.E.2d 420 (Ind. 1983).

73. See *id.* at 423.

74. *Harshman v. State*, 115 N.E.2d 501 (Ind. 1953).

75. *Ross*, 456 N.E.2d at 423.

76. *Harshman*, 115 N.E.2d at 502.

77. 658 N.E.2d 72 (Ind. 1995).

78. *Id.* at 76.



the attack on the rationale of *Ross* and *Harshman* occurred on two fronts—not only did subsequent cases limit *Ross* to the relatively narrow circumstance of a defendant pleading guilty and *simultaneously* protesting innocence, but subsequent cases found the factual basis to be a matter of discretion for trial judges to the extent that the requirement often became illusory. Its mandates were considered satisfied through a variety of discretionary procedures.

The Indiana Supreme Court has found that a guilty plea is not invalid under *Ross* simply because the defendant states that he is unable to remember the circumstances of the crime because a lack of memory is not a protestation of innocence.<sup>79</sup> Also, to render a guilty plea invalid under *Ross*, there must be protestations of innocence rather than an unwillingness or failure to admit to the offense<sup>80</sup> and the protestations must occur at the time of the entry of the plea of guilty. For example, a protestation of innocence offered at a hearing on a motion to withdraw guilty plea held after entry of the guilty plea, but before sentencing, did not automatically invalidate the plea, leaving the trial judge with discretion to deny the motion.<sup>81</sup> Likewise, a protestation of innocence outside the courtroom, such as to a probation officer preparing a pre-sentence report, does not render a plea invalid, even if the claim of innocence makes its way into the record of the case.<sup>82</sup> Further, a plea of guilty is not necessarily invalid under *Ross*, according to the Indiana Court of Appeals, even when there is a protestation of innocence “to a degree” in the courtroom at sentencing *and* a claim of innocence to the probation officer during the pre-sentence interview.<sup>83</sup>

Interestingly, in *Brooks v. State*,<sup>84</sup> the court of appeals invalidated a guilty plea pursuant to *Ross* in view of the defendant’s protestation of innocence during the pre-sentence interview with the probation officer and during the sentencing hearing.<sup>85</sup> The court acknowledged that out-of-court protestations of innocence had been held to be inconsequential by the supreme court in *Moredock*,<sup>86</sup> but the supreme court had “yet to modify *Ross* to the extent a protestation of innocence made prior to the acceptance of a guilty plea is similarly inconsequential even with a sufficient factual basis for the plea.”<sup>87</sup> In an apparent effort to ensure that trial judges have virtually unfettered discretion in accepting a guilty plea from a willing defendant, the *Brooks* decision was repudiated by the court of appeals in *Carter v. State*.<sup>88</sup> In *Carter*, the court of appeals rejected *Brooks* not only “as an

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79. See *Gibson v. State*, 490 N.E.2d 297 (Ind. 1986).

80. See *Bates v. State*, 517 N.E.2d 379 (Ind. 1988).

81. See *Bewley v. State*, 572 N.E.2d 541 (Ind. Ct. App. 1991).

82. See *Moredock v. State*, 540 N.E.2d 1230, 1231 (Ind. 1989). The supreme court did, however, acknowledge that the trial judge should question the defendant regarding the protestations of innocence prior to sentencing the defendant. See *id.*

83. See *Harris v. State*, 671 N.E.2d 864 (Ind. Ct. App. 1996).

84. 577 N.E.2d 980 (Ind. Ct. App. 1991).

85. See *id.*

86. See *Moredock*, 540 N.E.2d at 1230.

87. *Brooks*, 577 N.E.2d at 981.

88. 724 N.E.2d 281 (Ind. Ct. App. 2000), *aff’d*, 739 N.E.2d 126 (Ind. 2000).



unnecessary extension of the law of *Ross*" but also "destructive to the intent of the plea statutes."<sup>89</sup> The court of appeals attempted to shift the focus away from the inquiry of whether the court has formally accepted the guilty plea and set the matter for sentencing or has taken the tendered guilty plea under advisement pending sentencing.<sup>90</sup> As long as the trial judge properly conducts the plea hearing, the majority in *Carter* holds that a guilty plea may be accepted even if there are later protestations of innocence, including those proffered at the sentencing hearing.<sup>91</sup>

In a dissenting opinion, Judge Sullivan argued that based on *Brooks*, when the defendant protested his innocence at the sentencing hearing prior to the trial court accepting the guilty plea, the court was required to set aside the guilty plea.<sup>92</sup> In a footnote, Judge Sullivan indicated that a defendant may enter a best interests plea pursuant to *Alford*.<sup>93</sup> After granting transfer, the supreme court summarily affirmed the majority opinion of the court of appeals and specifically disapproved of *Brooks*.<sup>94</sup> The supreme court noted that *Harshman* and *Ross* established that an Indiana trial court may not accept a guilty plea that is accompanied by a denial of guilt, but the *Harshman-Ross* rule is applicable only when the protestation of innocence occurs at the same time the defendant attempts to plead guilty.<sup>95</sup> In specifically rejecting *Brooks*, the supreme court cited as controlling authority its decision in *Owens v. State*.<sup>96</sup> With deference to the supreme court and its reliance on a case decided two years prior to *Ross*, the present state of the law regarding the factual basis requirement and best interests plea remains rather muddled in spite of the apparent certainty of *Carter*, *Ross* and *Harshman*.

To underscore the murkiness and confusion regarding *Ross* and its progeny, the Indiana Supreme Court has carved out an exception to the general rule that protestations of innocence must occur in the courtroom simultaneously with the plea of guilty in murder cases in which the death penalty may be imposed.<sup>97</sup> In what is surely an appropriate concession to the admonition that great caution be exercised by trial court judges in accepting a plea of guilty, our supreme court noted: "In Indiana we will not execute people who plead guilty and then protest innocence at their sentencing hearing."<sup>98</sup> However, even this singular exception to the general rule was tempered by the supreme court when it held that a defendant in a capital murder case does not have the unfettered right to plead guilty and later withdraw it or have it invalidated due to a subsequent protestation

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89. *Id.* at 285.

90. *See id.* at 284-85 (both procedures are permissible under the guilty plea statutory scheme).

91. *See id.* at 284.

92. *See id.* at 286 (Sullivan, J., dissenting).

93. *See id.* at 286 n.4.

94. *See Carter v. State*, 739 N.E.2d 126 (Ind. 2000).

95. *Id.* at 129.

96. 426 N.E.2d 372 (Ind. 1981).

97. *See Patton v. State*, 517 N.E.2d 374 (Ind. 1987).

98. *Id.* at 376.



of innocence:

The most important consideration in applying the Ross rule to capital cases is the need for heightened reliability of the guilty determination. There can be no per se rule, however, to evaluate the reliability of these determinations. It is a decision that must be made upon the facts of each case. It almost goes without saying that a plea in a capital case must be more carefully and fully explored on the record with the defendant than a plea which subjects the defendant only to a term of years. A later request to withdraw such a plea calls for examining whether the plea was given truthfully and intelligently and whether the request to withdraw arises out of genuine misapprehension or out of a desire to manipulate.<sup>99</sup>

Although the cases cited make it apparent that the rationale of *Ross* and *Harshman* has been narrowed by the appellate courts, the rationale of *Ross*, and indeed, the entire concept of requiring a factual basis for a plea of guilty, is imperiled when trial courts conduct factual basis inquiries with few parameters and restrictions to ensure a legitimate and meaningful inquiry. Simply stated, the factual basis requirement is no longer a barrier to any guilty plea the judge desires to accept. In fact, the Indiana Supreme Court has recently determined that the failure of a trial court to establish a factual basis for a guilty plea is not grounds for granting a petition for post-conviction relief unless the petitioner/defendant demonstrates prejudice by the omission.<sup>100</sup> The Indiana Supreme Court quotes from a previous decision in which it held that failure to comply with a statutory advisement of rights (except the rights required by *Boykin v. Alabama*<sup>101</sup>) was not grounds for granting post-conviction relief unless the petitioner/defendant proved that the failure affected the decision to plead guilty:

Routine reversal of convictions on technical grounds imposes substantial costs on society. . . . [J]urors, witnesses, judges, lawyers, and prosecutors may be required to commit further time and other resources to repeat a trial which has already taken place. The victims are caused to re-live frequently painful experiences in open court. The erosion of memory and the dispersal of witnesses may well make a new trial difficult or even impossible. If the latter is the case, an admitted perpetrator will be rewarded with freedom from prosecution. Such results prejudice society's interest in the prompt administration of justice, reduce the deterrent value of any punishment, and hamper the rehabilitation of wrongdoers.<sup>102</sup>

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99. *Trueblood v. State*, 587 N.E.2d 105, 108 (Ind. 1992).

100. *See State v. Eiland*, 723 N.E.2d 863 (Ind. 2000).

101. 395 U.S. 238 (1969). The *Boykin* rights include the right to a trial by jury, the right of confrontation, and the right against self-incrimination. *See id.*

102. *Eiland*, 723 N.E.2d at 865 (quoting *White v. State*, 497 N.E.2d 893, 905 (Ind. 1986)).



Although the reversal of convictions on technical grounds is abhorrent, the costs of repeating a trial are non-existent in most guilty plea scenarios and rewarding "an admitted perpetrator"<sup>103</sup> with the constitutional right of trial when there was no legitimate admission in the first instance seems reasonable. Society's interest in punishing the guilty should not convert the accuracy inquiry for a plea of guilty into a mere technicality that constitutes a bothersome snare for the unsuspecting trial judge dedicated to the prompt and efficient administration of justice. As the Indiana Supreme Court held:

A requirement that a guilty plea manifest an unqualified admission of guilt does not exalt form over substance. It implements fundamental notions of due process essential to the fair and just administration of criminal law. It protects a defendant's right to require proof of his guilt before a jury. It also obviates a collateral attack on a judgment by a later claim the plea was too equivocal to bind the pleader and permit entry of judgment. For these reasons, we prohibit trial courts from accepting guilty pleas from people who maintain their innocence.<sup>104</sup>

The present Indiana approach to the factual basis requirement does not require an unqualified admission of guilt. Indeed, no admission of guilt is necessary in view of the factual basis procedures authorized by the appellate courts. For example in the cases of *Lee v. State*,<sup>105</sup> and *Zavesky v. State*,<sup>106</sup> the court of appeals held that a colloquy between a defendant and a judge over specific allegations is not a necessity for a factual basis, as the court may rely on statements other than sworn testimony of the defendant for an adequate factual basis.

Although it is clear from the legislative scheme that a court may be satisfied with a factual basis for the guilty plea either from its examination of the defendant *or* from the evidence presented, a factual basis determination is not required until there is a knowing and voluntary guilty plea from the defendant.<sup>107</sup> Specifically, from the totality of the circumstances, the trial judge must determine that there is a voluntary and knowing plea of guilty (proper admonishments are required) and that there is a sufficient factual basis for the plea. Additionally, although one determination may assist the court in making the other, there is a clear distinction between the two.<sup>108</sup> A trial judge has discretion regarding the method to be utilized in establishing a factual basis, but a sufficient factual basis is necessary only if there is a voluntary and knowing guilty plea. Directly stated, until a defendant clearly indicates a knowing and voluntary desire to plead guilty, the trial judge is not required to conduct an

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103. *Id.*

104. *Patton v. State*, 517 N.E.2d 374, 376 (Ind. 1987).

105. 538 N.E.2d 983 (Ind. Ct. App. 1989).

106. 514 N.E.2d 658 (Ind. Ct. App. 1987).

107. *See* IND. CODE § 35-35-1-3 (2000).

108. *See* KERR, *supra* note 48, at 210.



accuracy inquiry.

Commenting on trial court discretion in establishing a factual basis, the Indiana Supreme Court has held "a finding of factual basis is a subjective determination that permits a court wide discretion—discretion that is essential due to the varying degrees and kinds of inquiries required by different circumstances."<sup>109</sup> To a disturbing degree, the need for trial court discretion has been caused by the Indiana Supreme Court's failure to focus regular and consistent attention on the issue. If the Indiana Supreme Court provided specific parameters and guidelines on the issues surrounding the factual basis requirement, there would be fewer circumstances in which trial court discretion would be exercised (and ultimately authorized on a piecemeal basis by the appellate courts). While reasonable discretion must remain with the trial court in that there are "varying degrees and kinds of inquiries required by different circumstances,"<sup>110</sup> certain matters should be consistent in every criminal court in Indiana. Just as a guilty plea cannot be considered knowing, voluntary and intelligent unless the record discloses that the defendant knowingly waived his or her *Boykin* rights,<sup>111</sup> it is time for our supreme court to specifically delineate the substance and procedure of the guilty plea factual basis requirement in Indiana criminal courts.

## VII. SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

As the American system of justice has evolved from one in which its courts were very reluctant to receive and record guilty pleas<sup>112</sup> to one in which the highest court of the land notes that "disposition of criminal charges by agreement between the prosecutor and the accused, . . . is an essential component of the administration of justice,"<sup>113</sup> it is indisputable that the guilty plea is the predominant dispositional method in American criminal courts. Likewise, the process and substance of pleading guilty has evolved in the various jurisdictions through legislative enactments, appellate court decisions and customs and practices of trial court judges. The present guilty plea process in Indiana consists of certain elements that have been recognized as essential components of the process, while other requirements have been added as deemed necessary to ensure the continued legitimacy and integrity of the criminal justice system.

Unlike the inherent requirement of voluntariness, the factual basis component of a guilty plea was mandated in Indiana by legislative enactment in 1973, although it had been employed by individual trial court judges and addressed by the Indiana Supreme Court prior to that time.<sup>114</sup> Because the legislative provision set forth the factual basis requirement in general terms,

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109. *Butler v. State*, 658 N.E.2d 72, 76-77 (Ind. 1995).

110. *Id.* at 77.

111. *Griffin v. State*, 617 N.E.2d 550 (Ind. Ct. App. 1993).

112. *See Griffith v. State*, 36 Ind. 406 (1871).

113. *Santobello v. New York*, 404 U.S. 257, 260 (1971).

114. *See supra* notes 41-48 and accompanying text.



meeting the requirement was left to the discretion of the trial courts subject to judicial review by the Indiana Court of Appeals and the Indiana Supreme Court. Unfortunately, because of the divergent and haphazard manner in which it has been implemented in the trial courts and the lack of consistent, legitimate review and consequent guidance from the Indiana Court of Appeals and the Indiana Supreme Court, the factual basis requirement is imperiled to the point of constituting a threat not only to the due process interests of individual defendants but also to the efficient administration of justice.

*A. A Modest Proposal to Strengthen the Factual Basis*

The emasculation of the factual basis requirement merits immediate attention. Although the issues could be addressed by the Indiana General Assembly, much of what ails the guilty plea factual basis procedure should be remedied by the Indiana Court of Appeals and the Indiana Supreme Court. In fact, the factual basis requirement may be resuscitated by the Indiana Supreme Court without complete abandonment of *Ross*<sup>115</sup> and *Harshman*,<sup>116</sup> so long as the court is willing to mandate compliance with the rationale set forth in those cases while also redirecting the attention of the trial courts to the statutory guilty plea procedure.<sup>117</sup>

To reinvigorate the factual basis requirement while upholding the *Ross* rule, the Indiana Supreme Court must require a record from the trial court that demonstrates a voluntary, knowing and intelligent guilty plea *and* an unqualified admission of guilt from the defendant. Although a simple, "Did you do it?" may be a bit unrefined, a straightforward inquiry and an unqualified affirmative response must be part of the record. In what would constitute more than a semantic adjustment, the *Ross* rule should be modified to replace the protestation of innocence standard with a requirement of unqualified admission. The accuracy of a guilty plea should be determined by the certainty of the admission, not the degree to which the defendant protests his innocence. If a defendant does not provide an unqualified admission, the guilty plea would be invalid regardless of whether the defendant's actions may be characterized as protestations of innocence. Further, a silent record on the issue of an unqualified admission would invalidate a guilty plea even in the absence of protestations of innocence.

Moreover, as *Harshman* clearly provides, "a plea of guilty tendered by one who in the same breath protests his innocence, *or declares he actually does not know whether or not he is guilty*, is no plea at all."<sup>118</sup> Therefore, it should be an unquestioned principle of Indiana law that a defendant who equivocates because he believes himself innocent or because he does not know whether he is guilty, must not be allowed to plead guilty. The unqualified admission standard would

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115. *Ross v. State*, 456 N.E.2d 420 (Ind. 1983).

116. *Harshman v. State*, 115 N.E.2d 501 (Ind. 1953).

117. See IND. CODE §§ 35-35-1-2 to -3 (stating when guilty plea may be accepted), and § 35-35-1-4 (stating when guilty plea may be withdrawn) (2000).

118. *Harshman*, 115 N.E.2d at 502 (emphasis added).



underscore not only the *Ross* prohibition against "best interests pleas" but also the more expansive guilty plea prohibitions of *Harshman*.

Upon the voluntary, knowing and intelligent guilty plea from the defendant and the unqualified admission of guilt, the record must also reflect the evidence considered by the judge to constitute a sufficient factual basis for the plea of guilty. As provided by statute, the trial judge may accomplish this task through examination of the defendant or other evidence presented.<sup>119</sup> Whether the factual basis is established through sworn testimony from the defendant or other evidence presented, if the defendant denies guilt during the factual basis process, the guilty plea must be rejected even if the defendant seeks to plead guilty in spite of the denial. If there is a voluntary, knowing and intelligent guilty plea accompanied by an admission of guilt and a sufficient factual basis, the plea shall be considered accepted regardless of whether the plea is taken under advisement until sentencing or judgment of conviction is entered with sentencing set at a later date.<sup>120</sup> Upon acceptance of the guilty plea, later protestations of innocence, whether outside the courtroom to a probation officer or inside the courtroom to the judge at a subsequent hearing, will not invalidate a guilty plea except as the trial judge determines appropriate under a motion to withdraw the plea filed pursuant to statute.<sup>121</sup>

With renewed commitment to the principles of *Ross* and *Harshman* and the statutory provisions regarding guilty pleas, there will be renewed commitment to the proposition that because an admission of guilt deprives the defendant of the right to a jury trial, a guilty plea should be cautiously received.<sup>122</sup> Indeed, a renewed commitment to *Ross* and *Harshman* will enable the criminal justice system to ensure that a person who pleads guilty truly is guilty.<sup>123</sup>

### *B. An Alternative and Radical Proposal*

The Indiana Supreme Court should initiate a more efficient approach to the factual basis requirement by specifically repudiating the remaining vestiges of *Ross* and *Harshman* while simultaneously strengthening and standardizing the factual basis inquiry process. With the protestation of innocence standard of *Ross* and *Harshman* properly put to rest, the more pragmatic issues of the guilty plea process, including the troublesome matter of a defendant who wishes to plead guilty but does not wish to admit to the allegations, can be addressed with due regard for the rights of the defendant and the interests of society.

To argue that *Ross* should be overruled is not to suggest that the factual basis requirement should or will be weakened. On the contrary, the *Ross* rule that a guilty plea is invalidated only if the defendant protests his innocence while simultaneously pleading guilty is a weak and ineffectual standard which can be

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119. See IND. CODE § 35-35-1-3(b) (2000).

120. See *Carter v. State*, 739 N.E.2d 126 (Ind. 2000).

121. See IND. CODE § 35-35-1-4 (2000).

122. See *Patton v. State*, 517 N.E.2d 374, 375 (Ind. 1987).

123. See *Butler v. State*, 658 N.E.2d 72, 76 (Ind. 1995).



easily met or manipulated, particularly with the wide discretion granted the trial judge in establishing a factual basis. Likewise, to allow the trial court the discretion to accept a plea from someone unable or unwilling to admit to the allegations does not mean that there will be no factual basis for the plea. The factual basis for such a plea would require heightened judicial scrutiny because the judge could not simply rely on the uncorroborated representations of the defendant.

In proposing the sanctioning of a guilty plea by one who is unwilling to admit the commission of the crime but nevertheless believes it in his best interests to plead guilty, attention is redirected to the language of *North Carolina v. Alford*.<sup>124</sup>

Thus, while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.

Nor can we perceive any material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.<sup>125</sup>

Although it is clear that today Indiana courts may deny defendants the opportunity to enter a "best interests plea" or an "*Alford* plea,"<sup>126</sup> it should be remembered that for approximately ten years following *Boles*<sup>127</sup> and prior to *Ross*,<sup>128</sup> defendants were permitted to enter best interests pleas. In view of the present state of Indiana law regarding guilty pleas and the factual basis requirement, best interests pleas should be reinstated. The present state of the law and procedure regarding guilty pleas raises certain policy concerns against the present approach. For example, in view of the *Ross* rule, some judges may refrain from meaningful inquiries into the circumstances of the offense to avoid any equivocation by the defendant which later could be raised as a protestation of innocence. In fact, one judge responded to the questionnaire that the factual basis procedure should be conducted by the defense attorney because only he or she knew what the defendant would admit to. Reticence on the part of a cautious judge to engage in meaningful dialogue with the defendant in order to maintain the validity of the process limits the judge's ability to determine voluntariness and the existence of a factual basis and may deprive the court of other potentially

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124. 400 U.S. 25 (1970).

125. *Id.* at 37.

126. *See id.* at 38 n.11.

127. *Boles v. State*, 303 N.E.2d 645 (Ind. 1973).

128. *Ross v. State*, 456 N.E.2d 420 (Ind. 1983).



relevant information. The present approach focuses inordinate attention on what the defendant will or will not say in court as opposed to what the defendant did or did not do in relation to the charges.

Another matter which may be better addressed by utilization of a best interests plea is the dilemma for the innocent defendant who must choose between facing the uncertainties of trial in spite of an attractive plea agreement or committing perjury in order to obtain the benefit of the bargain. In *Scheckel v. State*,<sup>129</sup> the Indiana Supreme Court noted that by pleading guilty the defendant had saved court time and resources and spared the victim's family from enduring the difficulties of trial, and "a defendant who willingly enters a plea of guilty has extended a substantial benefit to the state and deserves to have a substantial benefit extended to him in return."<sup>130</sup> It is ironic that the present guilty plea system openly extends a benefit to the guilty defendant as well as a defendant willing to admit to a crime not committed, but withholds that same benefit from the defendant unwilling to admit to false allegations. This unintended result may necessitate wide discretion for trial court judges in establishing a factual basis under the mandates of *Ross*.

Another troublesome aspect of Indiana's present approach to guilty pleas is that it occasionally exposes a defense attorney to the untenable position of being unable to counsel acceptance of a course of conduct that is clearly in the client's best interests. The defense attorney must tell the client that the plea agreement offered is conditioned upon a guilty plea and a guilty plea is conditioned upon an admission of guilt. The defense lawyer also must remind the client that perjury is a serious matter and that the decision to plead guilty ultimately rests with the defendant. A pragmatic defendant may simply seek counsel's well timed prompting of when to say "guilty" or "yes, Judge" during the courtroom ritual of pleading guilty. Just as some defendants willingly but dishonestly indicate an understanding of "beyond a reasonable doubt" and the "right against self-incrimination," some defendants may be willing to admit guilt regardless of the truth of the assertion if the admission is necessary to obtain a perceived advantage.

Other defendants steadfastly refuse to admit to the crime even though conviction at trial may result in a harsher sentence. To salvage the advantages and efficiency of a guilty plea resolution, the defense attorney must encourage the criminal justice system to modify or ignore the factual basis requirement. For example, there is the occasional defendant who voluntarily pleads guilty but, when asked about the allegations, relates a version which constitutes a denial of the offense. After a quick "off the record" conference with the defense attorney, the defendant restates the narrative and admits participation in the crime. Of course, the judge may reject the admission as an unacceptable sham. However, under present case law, the judge has discretion to proceed and the defendant's initial denial will not be considered a protestation of innocence sufficient to support a later challenge of the plea.

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129. 655 N.E.2d 506 (Ind. 1995).

130. *Id.* at 511 (quoting *Williams v. State*, 430 N.E.2d 759, 764 (Ind. 1982)).



While it is true that a guilty plea may be accepted under the present approach without the defendant's sworn admission, this is a rather disingenuous procedure when contrasted with the best interests plea process. By sanctioning the divergent approaches to the factual basis process to circumvent the unwieldy *Ross* rule without specifically overruling it, the Indiana appellate courts are undermining the legitimacy of the entire guilty plea process. For example, in *Corbin v. State*<sup>131</sup> the court of appeals upheld a conviction following a bench trial during which all the State's evidence was entered by stipulation from the defense, which also agreed not to offer any evidence contesting the charge.<sup>132</sup> Although Judge Staton concurred in the denial of Corbin's claim that the procedure was defective because it was an impermissible nolo contendere plea (a plea in which the defendant neither admits nor denies guilt), he specifically cautioned against the procedure because it could be used to skirt the Indiana Supreme Court's *Ross* rule.<sup>133</sup> Concurring in the validity of the procedure despite his concerns and reservations, Judge Staton provided a clear example of the ineffectual nature of the present protestation of innocence standard of *Ross*:

In this case, Corbin essentially pleaded guilty, but he did so without having to enter a formal plea of guilty or admit his guilt. Our supreme court has stated that "[a]n Indiana defendant must admit the offense to which he is pleading guilty." The record in this case does not reveal that Corbin ever proclaimed his innocence, or even that he was unwilling to admit his guilt. Thus, Corbin is not entitled to reversal on this ground. Nevertheless, I can envision circumstances where criminal defendants might enter into agreements with the State, similar to the one entered into by Corbin, in an effort to avoid the requirement that they not plead guilty and proclaim their innocence at the same time.<sup>134</sup>

Submitting a case on the record or by stipulated evidence as in *Corbin* is clearly and unmistakably an effort to circumvent the *Ross* rule and because the record does not demonstrate protestations of innocence, the hybrid "no trial—no guilty plea" procedure is sanctioned.

Although there are defensible policy reasons for the end result of a conviction without a trial or an admission of guilt from the defendant, there is no justification for the continued reliance on the illusory proposition that a guilty plea must be accompanied by an admission of guilt. If a fully informed defendant wishes to voluntarily plead guilty without admitting guilt because the plea is deemed to be in the defendant's best interests, the trial judge should be given the discretion to allow the defendant to proceed in that manner without subterfuge. Simply stated, *Ross* should be overruled. To repudiate *Ross* and sanction the best interests plea is not enough to ensure the viability of the factual basis requirement. The Indiana Supreme Court must also make certain that the

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131. 713 N.E.2d 906 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 303 (Ind. 1999).

132. *See id.* at 907.

133. *See id.* at 909 (Staton, J., concurring).

134. *Id.* (internal citation omitted).



factual basis requirement is an essential and fundamental part of the trial court plea process whether the defendant unequivocally pleads guilty or seeks to enter a best interests plea pursuant to *Alford*. The supreme court may do so only by imbuing the basic factual basis procedure with constitutional import.

Specifically, and as set forth above in the more modest proposal to resuscitate and modify the *Ross* rule, when a defendant tenders a plea of guilty, the record must reflect both a knowing, intelligent, voluntary plea of guilty and an unequivocal admission of guilt by the defendant. The focus for the trial court judge must be on the unqualified desire to plead guilty and the unequivocal admission of guilt and not on whether the record reflects any protestations of innocence. If the record does not demonstrate a knowing, intelligent and voluntary guilty plea and an unqualified admission, acceptance of a guilty plea would be reversible error.

Further, upon a knowing, voluntary and intelligent guilty plea and an admission of guilt, the record must reflect the evidence relied upon by the trial judge to establish a factual basis for the guilty plea. Pursuant to current law, that evidence may consist of the sworn testimony of the defendant or other evidence presented. Upon a finding that the plea was voluntary, knowing, intelligent, and supported by a sufficient factual basis, the plea would be accepted and would not be invalidated by protestations of innocence or withdrawn by the defendant except as allowed by statute.<sup>135</sup>

Alternatively, a defendant who wishes to plead guilty but is unwilling or unable to admit to the allegations, would be allowed to enter a best interests plea. While any equivocation on the part of the defendant about proceeding would invalidate the request to enter the best interests plea, the trial judge would have the discretion of entering conviction if the defendant's actions were found to be knowing, intelligent, voluntary and there was a sufficient factual basis supporting the guilty plea. The judge would be required to designate the evidence relied upon to establish a factual basis for the plea. The prosecutor, victim or other interested party would have the right to be heard on whether the best interests plea should be permitted by the court; however, acceptance of the plea and entry of conviction would be left to the sound discretion of the trial court.

Likewise, the method by which a factual basis was established and the evidence to be relied upon in establishing the factual basis would be left to the discretion of the trial judge, subject to review by the appellate courts for abuse of discretion. In determining the existence of an adequate factual basis, the trial court must be satisfied that there is sufficient evidence of probative value to demonstrate that the defendant is guilty of the crime to which the defendant is pleading. After a plea has been accepted, it could not be withdrawn by the defendant except as allowed by statute.

Recognizing and sanctioning a best interests plea while simultaneously mandating a legitimate factual basis procedure would properly acknowledge the fact that:

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135. See IND. CODE § 35-35-1-4 (2000).



A person charged with a crime may wish to plead guilty to the charge for one of several reasons. He may wish to avoid the time and trouble, or he may hope to spare his family the anguish and embarrassment occasioned by criminal proceedings or he may hope that his cooperation will be reflected by lesser punishment. But despite these rational and simple reasons for a plea of guilty, there are procedures and safeguards the judicial system must impose on the entertaining of guilty pleas.<sup>136</sup>

The trial court judge should necessarily retain broad discretion in conducting the guilty plea procedure so long as that discretion does not relegate the accuracy inquiry embodied in the factual basis requirement to the status of a mere legal technicality. In a system dependent upon the guilty plea as the predominant method by which cases are resolved, the due process rights of the individual defendant as well as society's interest in the fair and proper administration of justice demand nothing less.

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136. IND. CODE OF CRIM. PRO., cmts. at 177 (Proposed Final Draft 1972).



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## NOTE

### THE SWINGING PENDULUM OF VICTIMS' RIGHTS: THE ENFORCEABILITY OF INDIANA'S VICTIMS' RIGHTS LAWS

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#### INTRODUCTION

The victim's place within America's criminal justice system has undergone a marked shift over the past two decades. In response to growing concerns regarding the exceedingly peripheral role victims play in the prosecution of the crimes committed against them,<sup>1</sup> states have begun to search for ways to be more responsive and sensitive to victims' needs. As a result, state legislatures have passed an ever growing number of laws granting victims increased rights within the criminal justice process.<sup>2</sup>

Indiana joined the victims' rights movement in 1996 with the passage of its own victims' rights amendment.<sup>3</sup> Three years later, the Indiana General Assembly gave further meaning and scope to the amendment by passing a

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1. See Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 372 (1986).

2. Thirty-two states have passed victims' rights amendments to their constitutions. See ALA. CONST. amend. 557; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. 2, § 2.1; CAL. CONST. art. I, § 28; COLO. CONST. art. 2, § 16a; CONN. CONST. art. XXIX; FLA. CONST. art. 1, § 16(b); IDAHO CONST. art. 1, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. 1, § 13(b); KAN. CONST. art. 15, § 15; LA. CONST. art. I, § 25; MD. DECL. OF RIGHTS Art. 47; MICH. CONST. art. 1, § 24; MISS. CONST. art. 3, § 26A; MO. CONST. art. 1, § 32; NEB. CONST. art. I, § 28; NEV. CONST. art. 1, § 8; N.J. CONST. art. 1, para. 22; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10a; OKLA. CONST. art. 2, § 34; OREG. CONST. art. 1, § 42; S.C. CONST. art. I, § 24; R.I. CONST. art. 1, § 23; TENN. CONST. art. 1, § 35; TEX. CONST. art. 1, § 30; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8-A; WASH. CONST. art. I, § 35; WIS. CONST. art. 1, § 9m. Similarly, the United States Congress has passed several laws ensuring that the interests of victims are better protected during the prosecutorial process. See Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 1512-1515 (1994 & Supp. 2000); Victims of Crime Act of 1984, 42 U.S.C. §§ 10601-10604 (1997); Victims' Rights and Restitution Act of 1990, 42 U.S.C. §§ 10606-10607 (1997).

3. See IND. CONST. art. I, § 13(b).



victims' rights statute.<sup>4</sup> However, in the fall of 1999, the strength of Indiana's victims' rights laws were put to their first test in *Newman v. Indiana Department of Correction*.<sup>5</sup> In this action, Marion County Prosecutor, Scott C. Newman, along with four crime victims and prosecutors from eighteen Indiana counties, brought an action requesting that the court declare the Community Transition Act (an offender early release program)<sup>6</sup> unconstitutional in that it violated the rights of Indiana crime victims. The action was short lived and dismissed by the trial court on grounds that the victims lacked standing to bring their claim.<sup>7</sup>

The result in *Newman* raises compelling questions regarding the effectiveness and enforceability of Indiana's victims' rights laws. While the current status of Indiana's victims' rights laws raises no question as to the state's commitment to providing victims with rights, the full scope and enforceability of those rights remain unclear. In light of these questions, this Note will examine the extent of rights afforded to victims in Indiana, and query how the state might better protect and enforce those rights.

In examining the effectiveness and enforceability of Indiana's victims' rights amendment and enabling legislation, Part I of this Note places Indiana's victims' rights movement in a larger context by providing a brief history of the victims' developing role in the criminal justice system. Part II of this Note examines the basic structure and scope of Indiana's victims' rights laws and how these laws were invoked and ultimately rejected in *Newman*. Part III of this Note examines the key issues raised in *Newman* and compares them to victims' rights challenges raised in other states. In particular, this section highlights how victims' attempts to enforce their rights tend to have limited success. These sparse successes are predicated by the reality that most victims' rights laws provide only a circumscribed scope within which victims can seek redress for the violation of their rights. However, a handful of states take a broader approach to enforcing victims' rights, and have established specific victims' rights enforcement mechanisms through the use of the writ of mandamus and the creation of victims' rights oversight committees. Parts IV and V of this Note examine these two enforcement mechanisms and advocate that some combination of these models be adopted in Indiana.

Although *Newman* provided only the most limited of opportunities to test the mettle of Indiana's victims' rights laws, it nonetheless highlighted Indiana's struggle in determining the proper place and rights of victims in Indiana. While Indiana has taken impressive steps in granting victims solid and substantial rights,<sup>8</sup> as the law currently stands, Indiana victims are quite limited in how they can seek to enforce these rights. Therefore, the Indiana legislature should enact

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4. See IND. CODE §§ 35-40-1-1 to -13. (2000).

5. *Newman v. Ind. Dep't of Corr.*, No. 49D01-9910-CP-1431 (Marion Super. Ct., Ind., dismissed, Jan. 18, 2000).

6. See IND. CODE §§ 11-8-1-5.5 to 5.6; § 11-12-10-1 to -4 (2000).

7. See Findings of Fact and Conclusions of Law and Order Den. Inj. Relief and Dismissing Action, *Newman v. Ind. Dep't of Corr.*, No. 49D01-9910-CP-1431 (Jan. 18, 2000).

8. See IND. CONST. art. I, § 13(b); IND. CODE § 35-40-1 to -13 (2000).



additional measures to more fully protect the rights of Indiana crime victims.

#### I. HISTORY OF THE VICTIMS' PLACE WITHIN THE CRIMINAL JUSTICE SYSTEM

The victim's position within the prosecutorial process has waxed and waned over the course of history. In some of the earliest manifestations of the criminal justice system, victims marshaled extensive control over prosecuting offenders.<sup>9</sup> However, victims' interests in bringing offenders to justice eventually gave way to the larger interests of the state, leaving the victim separated and disconnected from the criminal process.<sup>10</sup> However, over the past twenty years, victims have increasingly regained ground in the criminal justice process, marking a distinct shift in the scope and boundaries of the victim's role and place within the law.

In reflecting upon the growing prevalence of the victim in the law, one might posit that as our criminal justice system has evolved, the pendulum marking the balance between victims and defendants has swung far to one extreme, focusing entirely on the rights of defendants, to the exclusion of victims' rights. The victims' rights movement appears to be shifting the pendulum to a position where the victim has a more significant place within in the prosecutorial process. However, the proper location of the pendulum remains far from clear, leaving courts and legislatures continually challenged to identify the appropriate swing of its arc.

Crime victims have not always had to struggle for a place within the justice process. Dating from the Anglo-Norman era, crime victims had enormous, if not exclusive, control in prosecuting those who had committed crimes against them<sup>11</sup> under what is commonly referred to as the private prosecution model.<sup>12</sup> Under this model, a crime was seen primarily as an injury against an individual, rather than against the state, and the purpose of prosecution was to restore rights to the victim and obtain some form of restitution from the offending party.<sup>13</sup> However, as loosely knit feudal and rural communities gave way to more organized commerce-based centers, a need for centralized government systems developed and the private model was increasingly overshadowed by a state driven, public

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9. See generally Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. L. 839 (1997); Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21 (1999); Thad H. Westbrook, Note, *At Least Treat Us Like Criminals!: South Carolina Responds to Victims' Pleas for Equal Rights*, 49 S.C. L. REV. 575, 577 (1998).

10. See generally Richard Barajas & Scott Alexander Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1 (1997); Cardenas, *supra* note 1; Cellini, *supra* note 9; Tobolowsky, *supra* note 9.

11. See Westbrook, *supra* note 9, at 577.

12. See Tobolowsky, *supra* note 9, at 23-31.

13. See Cellini, *supra* note 9, at 842; Tobolowsky, *supra* note 9, at 23-37.



prosecution model.<sup>14</sup>

The public prosecution model supports the underlying notion that the prosecution and prevention of crime is a direct and primary interest of the government.<sup>15</sup> Commonly labeled by scholars as an "historical enigma," the exact origin of the public prosecution model is unclear and has been subject to a variety of different legal and historical theories.<sup>16</sup> Generally, as government and civic structures developed, an unspoken social contract was struck between the citizenry and government.<sup>17</sup> Under this "social contract theory," individuals "surrender[ed] certain freedoms to the government in exchange for mutual protection."<sup>18</sup> A state driven criminal justice system represented one form of protection government provided to its citizens, through which it sought to deter citizens from future breaches of the "social contract" by punishing and incarcerating present offenders of the contract.<sup>19</sup> As a result of this "social contract," society increasingly viewed criminal activity as an offense committed against the state as a whole, rather than merely as an offense committed against an individual victim.<sup>20</sup> Hence, governmental interests in deterring crime through incarceration began to overshadow the victim's interest in seeking restitution or compensation from the offender.<sup>21</sup>

America's criminal justice system has been almost entirely dominated by the public prosecution model. This dominance is further enhanced by the system's explicit focus on defendants' rights, to the exclusion of any mention of victims' rights. Neither the United States Constitution, nor the Bill of Rights bear any mention of victims' rights, while devoting several amendments (and countless cases articulating the scope of those amendments) to the rights of criminal defendants.<sup>22</sup>

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14. See Tobolowsky, *supra* note 9, at 23-26.

15. Scholar Cesare Beccaria advanced the notion that crime was not a private concern between the aggressor and the victim, but a societal concern. See Cardenas, *supra* note 1, at 366-69. Therefore, the criminal justice system should serve the interests of society, not the individual victim. See *id.*

16. See Cellini *supra* note 9, at 842-43.

17. See *id.* at 847-48.

18. *Id.* at 847.

19. See *id.*

20. See Barajas & Nelson, *supra* note 10, at 8-9.

21. See generally Cellini, *supra* note 9, at 847-48 (criminal prosecutions should serve societal interests of deterrence and retribution rather than interests of individual victims in private redress); Tobolowsky, *supra* note 9, at 25-26 (goals of the criminal justice system shifted to focus more on attempt to vindicate the harm done to society as opposed to harm to the individual).

22. See U.S. CONST. amend. IV (search and seizure rights); U.S. CONST. amend. V (grand jury, double jeopardy, self incrimination, and due process rights); U.S. CONST. amend. VI (speedy and public trial by impartial jury, confrontation, compulsory process for obtaining witnesses, assistance of counsel rights); U.S. CONST. amend. VIII (limits on excessive bail or cruel or unusual punishments). See also *Miranda v. Arizona*, 384 U.S. 436 (1966) (suspect must be given notice of his right to an attorney before the police may question the suspect); *Douglas v. California*, 372



One unfortunate consequence of the public prosecution model is that victims are relegated to a peripheral role in prosecuting the crime committed against them,<sup>23</sup> and the process is generally divorced from any consideration regarding the direct and specific harm suffered by the victim as a result of the perpetrator's actions. Damages suffered by the victim, whether they are physical, economical or psychological, tend to be viewed as incidental and secondary to the state's primary goal of deterring and punishing criminal activity.<sup>24</sup>

However, over the past twenty years, the American criminal justice system has appeared increasingly willing to find ways to reintegrate the victim into the prosecutorial process, indicating a shift in the swing of the pendulum charting the victim's place within criminal law.<sup>25</sup> Prompted in large part by the final report issued by the President's Task Force on Victims of Crime,<sup>26</sup> states began to pass victims' rights amendments to their constitutions, coupled with supporting legislation to further articulate, enhance and protect victims' rights.<sup>27</sup> However, despite the widespread passage of victims' rights laws, the exact and appropriate

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U.S. 353 (1963) (defendant has right to assistance of counsel on first appeal of right); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (defendant has fundamental right to assistance of counsel where punishment will include incarceration); *Mapp v. Ohio*, 367 U.S. 643 (1961) (evidence obtained by searches and seizures in violation of the constitution is admissible). Scholars have disagreed as to why there is no mention of victims in the United States' Constitution or Bill of Rights. Some have posited that when the first colonists came to America they "brought with them the English common law tradition of private prosecutions." Barajas & Nelson, *supra* note 10, at 9-10. Under this reasoning, because victims were able to control the prosecutorial process, there was no need to articulate victim rights in the Constitution or Bill of Rights. *See id.* Moreover, scholars have argued that regardless of the absence of specific rights articulated for victims, "victim's rights would surely have been presumed by the drafters of the Bill of Rights to be included in the Ninth Amendment's protection of unenumerated rights." Cellini, *supra* note 9, at 846. Conversely, others have argued that if there

were no public criminal prosecutions at the time of drafting the Bill of Rights . . . , the founders would not have included the Fourth, Fifth, Sixth, and Eighth Amendments, all of which protect the individual from the government in a criminal proceeding . . . [substantiating the argument that] it is perhaps self-evident what the framers felt about the relation of the interests of crime victims to criminal defendants—the rights of the defendant should predominate.

Rachel King, *Why a Victims' Rights Constitutional Amendment Is a Bad Idea: Practical Experiences from Crime Victims*, 68 U. CIN. L. REV. 357, 367-68 (2000).

23. *See* Cardenas, *supra* note 1, at 371-72.

24. *See id.*

25. *See* Barajas & Nelson, *supra* note 10, at 24.

26. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982).

27. *See supra* note 2, for list of state constitutional victims' rights amendments. *See also* ALA. CODE § 15-23-3-60 to -84 (1995); ARIZ. REV. STAT. § 13-4401 to -4437 (2000); LA. REV. STAT. ANN. § 46-1844 (West 1999 & Supp. 2000); S.C. CODE ANN. §§ 16-3-15-30 to -60 (Law. Co-op. Supp. 1999); UTAH CODE ANN. §§ 77-38-3 to -12 (1999) (giving examples of state victims' rights legislation).



place for the victim within the criminal justice system remains unclear and contentious. Critics of the movement argue that the criminal justice system is not necessarily the appropriate forum to address victim needs, positing that the law is ill equipped to remedy the vast emotional, physical and economic harms suffered by victims of crime.<sup>28</sup> More important, critics argue that increased victims' rights can result in decreased defendants' rights,<sup>29</sup> undermining core constitutional principles of due process<sup>30</sup> and the defendants' right to a fair trial.<sup>31</sup> Despite these valid arguments, states continue to pass victims' rights laws, and in so doing, challenge our traditional perceptions regarding the victim's place within the criminal justice system.

One cannot ignore that the pendulum marking the victim's place within American criminal law is shifting. As this shift is still in its infancy, the full arc of the pendulum remains unclear, and the ramifications of its slow shift uncertain. Nonetheless, an understanding of the historical progression of the victim within the law provides a foundation from which one can examine current victims' rights laws and analyze the scope of rights they afford to victims, and question how these rights should be enforced.

## II. INDIANA'S VICTIMS' RIGHTS LAWS

An examination of Indiana's victims' rights laws highlights the important task of identifying the appropriate scope and boundaries of these laws and questioning what method might best enforce them. Currently, while Indiana victims are afforded rights under the law,<sup>32</sup> the enforceability of these rights has not been fully tested and the strength of Indiana's victims' rights laws is not entirely clear.

### A. *Introduction to Indiana's Victims' Rights Laws*

In 1996, the Indiana General Assembly joined twenty-five of its sister states in passing a victims' rights amendment to its constitution.<sup>33</sup> Three years later, the Indiana General Assembly passed enabling legislation to further the purpose of the victims' rights amendment.<sup>34</sup> Noting that "many innocent persons suffer economic loss and personal injury or death as a result of criminal or delinquent acts,"<sup>35</sup> the General Assembly passed section 35-40 of the Indiana Code with the

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28. See generally Lynne Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937 (1985); Lynne Henderson, *Co-opting Compassion: The Federal Victim's Rights Amendment*, 10 ST. THOMAS L. REV. 579 (1998).

29. See generally Robert P. Mosteller & H. Jefferson Powell, *With Disdain for the Constitutional Craft: The Proposed Victims' Rights Amendment*, 78 N.C. L. REV. 371 (2000).

30. See U.S. CONST. amend. V.

31. See U.S. CONST. amend. VI.

32. See IND. CONST. art. I, § 13(b); IND. CODE § 35-40-1 to -13 (2000).

33. See IND. CONST. art. I, § 13(b).

34. See IND. CODE § 35-40-1 to -30 (2000).

35. *Id.* § 35-40-1-1.



intent to "[e]nact laws that define, implement, preserve and protect the rights guaranteed to victims by Article 1, Section 13 of the Constitution of the State of Indiana . . . [and to e]nsure that Article 1, Section 13 of the Constitution of the State of Indiana is fully and fairly implemented."<sup>36</sup>

In its full form, Section 13(b) of the Indiana Constitution reads:

Victims of crime, as defined by law, shall have the right to be treated with fairness, dignity, and respect throughout the criminal justice process; and, as defined by law, to be informed of and present during public hearings and to confer with the prosecution, to the extent that exercising these rights does not infringe upon the constitutional rights of the accused.<sup>37</sup>

As further articulated in the victims' rights statute, Indiana victims have the right to notice of their rights,<sup>38</sup> the right to information about the release or escape of the charged or convicted person from custody,<sup>39</sup> and the right to information, upon request, about the disposition of the criminal case involving the victim, or the conviction, sentence or release of the person accused of committing the crime against the victim.<sup>40</sup> Additionally, victims have the right to be heard at any proceeding involving sentencing or post-conviction release decisions.<sup>41</sup> Victims also have the right to confer with a representative from the prosecutor's office,<sup>42</sup> the right to have their safety considered in determining the release of the accused or defendant,<sup>43</sup> the right to contribute to the preparation of the presentence report,<sup>44</sup> and the right to pursue an order of restitution or other civil remedies against the person convicted of a crime against the them.<sup>45</sup> Finally, Indiana's

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36. *Id.* § 35-40-1-1.

37. IND. CONST. art. I, § 13(b). Indiana's victim's rights statute contains very similar language to that of the constitutional amendment reading "[a] victim has the right to be treated with fairness, dignity and respect throughout the criminal justice process." IND. CODE § 35-40-5-1 (2000).

38. *See* IND. CODE § 35-40-5-9 (2000).

39. *See id.* § 35-40-5-2.

40. *See id.* § 35-40-5-8.

41. *See id.* § 35-40-5-5; *see also* H.B. No. 1352, 112th General Assembly, 1st Regular Sess. (Ind. 2001). This bill seeks to require courts to order that victim impact statements prepared under Indiana Code § 35-38-1-2.5 be read aloud in the courtroom before the court imposes a sentence on a defendant convicted of murder.

42. *See id.* § 35-40-5-3. While the victim does have the right to confer with a representative from the prosecutor's office, this right does not allow the victim to direct the prosecution of the case against the accused. *See id.*

43. *See id.* § 35-40-5-4. Additionally, if a victim provides the prosecutor with an affidavit asserting that the defendant is threatening the victim or the victim's family, the prosecutor can file a motion with the court to have the defendant's bond order revoked. *See id.* § 35-40-6-6.

44. *See id.* § 35-40-5-6.

45. *See id.* § 35-40-5-7. Victims may also receive assistance from the prosecutor's office in filing restitution orders. *See id.* § 35-40-6-4(10). Also, they may participate in victim-offender



victims' rights laws do not "[p]rovide grounds for a person accused of or convicted of a crime or an act of delinquency to obtain any form of relief."<sup>46</sup>

*B. Newman v. Indiana Department of Corrections: A First Test of Indiana's Victims' Rights Laws*

Indiana's victims' rights amendment and legislation was put to its first test in *Newman v. Indiana Department of Correction*.<sup>47</sup> In this action, four crime victims and prosecutors from nineteen Indiana counties brought an action challenging the constitutionality of the an early release offender program, Community Transition Program (CTP), positing that it violated the rights of Indiana crime victims.<sup>48</sup>

The CTP was initially passed by the Indiana Legislature in 1999 and established a system by which offenders could be released into a community transition program "between two to four months before [their] expected release date, depending upon the severity of the . . . offenses."<sup>49</sup> At least forty-five days before an offender was eligible for transfer into the program, the Department of Corrections had to provide the sentencing court and the prosecutor with written notice of the offender's eligibility.<sup>50</sup> Upon receiving notice from the Department of Corrections, the sentencing court was required to determine whether the offender should be allowed to enter the CTP. If the offender's most serious conviction was a class C or D felony, the sentencing court could order the Department of Corrections to retain control over offender and deny his entry into the program. No hearing was required for this determination. However, if the

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reconciliation programs. *See id.* § 35-40-6-4(9).

46. *Id.* § 35-40-2-1. Numerous other states contain a similar limit in their victims rights laws. *See* CONN. CONST. art. XXIX; ILL. CONST. art. 1, § 8.1(d); IDAHO CONST. art. 1, § 22; KAN. CONST. art. 15, § 15(a); LA. CONST. art. I, § 25; MISS. CONST. art. 3, § 26A(2); MO. CONST. art. I, § 32.4; NEB. CONST. art. I, § 28; NEV. CONST. art. 1, § 8; N.M. CONST. art. II, § 24(B); N.C. CONST. art. 1, § 37(3); S.C. CONST. art. 1, § 24(B)(1); TENN. CONST. art. 1, § 35; TEX. CONST. art. 1, § 30(e); UTAH CONST. art. I, § 28(2); VA. CONST. art. I, § 8-A; WASH. CONST. art. I, § 35; ALA. CODE § 15-23-84 (1995); COLO. REV. STAT. § 24-4.1-303(16) (2000); LA. REV. STAT. ANN. § 46:1844.S. (West 1999 & Supp. 2000); MICH. COMP. LAWS. § 780.774 (1998); MISS. CODE ANN. § 99-36-5(3) (1999); MISS. CODE ANN. § 99-43-49 (1999); N.M. STAT. ANN. § 31-26-14 (Michie Supp. 2001); N.C. GEN. STAT. § 15A-840 (1999); TENN. CODE ANN. § 40-38-108 (1997); TEX. CRIM. PROC. CODE ANN. Art. 56.02(d) (Vernon Supp. 2001); UTAH CODE ANN. § 77-38-12(2) (1999); UTAH CODE ANN. § 77-37-5(5) (1999); WASH. REV. CODE § 7.69.050 (1992); WIS. STAT. § 950.10(2) (2000).

47. No. 49D01-9910-CP-1431 (Marion Super. Ct., Ind. *dismissed*, Jan. 18, 2000).

48. The prosecutors argued that the CTP abrogated their rights and duties as prosecutors in that the program limited their ability to enter into binding plea agreements with offenders. *See Findings of Fact and Conclusions of Law and Order Denying Inj. Relief and Dismissing Action, Newman v. Ind. Dep't of Corr.*, No. 49D01-9910-CP-1431, at 8 (Jan. 18, 2000).

49. *Id.* at 5.

50. *See* IND. CODE § 11-10-11.5-2 (2000).



court barred an offender's entry into the program, the court was required to issue findings of fact stating good cause for its decision.<sup>51</sup> Conversely, if the offender was convicted of a class A or B felony, the sentencing court could assign the offender to the CTP, provided the court issued written findings to the Department of Corrections explaining its decision. If the court did not present any written findings, the offender could not enter the CTP.<sup>52</sup>

In *Newman*, the victims argued that the CTP violated Article I, Section 13(b) of the Indiana Constitution, for the CTP did not establish any victim notice procedures or provide the victims with an opportunity to be heard in regard to the offender's release.<sup>53</sup> In light of these alleged violations, the victims requested that the court declare the CTP unconstitutional, and grant preliminary and permanent injunctions preventing the Department of Corrections from allowing felons to enter the CTP.<sup>54</sup> However, early within this action's proceedings, the trial court dismissed the case, primarily on the ground that the victims lacked standing to bring this constitutional challenge.<sup>55</sup>

In order for the victims to succeed in their contest against the CTP, they had the "burden to show that their legal rights, status or relationships . . . [were] invaded by the Legislature's enactment of the Community Transition Program."<sup>56</sup> However, the *Newman* court determined that the victims failed to satisfy this threshold issue of standing because the CTP did not abrogate any rights afforded to victims under Indiana law. Basing its analysis partly on definitions provided within Indiana statute, the court noted that the CTP represented "a form of imprisonment . . . [rather than] a post-conviction release and thus [was] not subject to the 'right to be heard' requirement for all post-conviction release decisions" under the Indiana's victims' rights amendment.<sup>57</sup>

Moreover, the trial court noted that even if the victims did have standing to contest the constitutionality of the CTP, their claims would still be dismissed. While the plaintiffs claimed that the CTP failed to provide victims with notice of an offender's release, the court reasoned otherwise, specifying that under the

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51. See *id.* § 35-38-1-24.

52. See *id.* § 35-38-1-25.

53. See Am. Compl. For Decl. Relief, Prelim. and Permanent Inj. and Specific Performance, *Newman*, No. 49D01-9910-CP-1431, at 19-20 (filed Nov. 10, 1999).

54. See *id.* at 22.

55. See Findings of Fact and Conclusions of Law and Order Den. Inj. Relief and Dismissing Action, *Newman v. Ind. Dep't of Corr.*, No. 49D01-9910-CP-1431, at 17 (Jan. 18, 2000).

56. *Id.* at 3.

57. *Id.* at 13. Under Indiana law, "imprison" means to "confine in a penal facility; commit to the department of correction; or assign to a community transition program." IND. CODE § 35-41-1-15 (2000). Conversely, "post-conviction release" means "parole, work release, home detention, or any other permanent, conditional, or temporary discharge from confinement of a person who is confined in the custody of the department of correction; or a sheriff; a county jail; a secure mental health facility; or a secure juvenile facility or shelter care facility." *Id.* § 35-40-4-6. However, under the rubric of the victims' rights statute, a victim's right to be heard extends only to any "proceeding involving a sentence or a postconviction release decision." *Id.* § 35-40-5-5.



rubric of the CTP, program officials were required to inform prosecutors of an offender's potential release into the program. The prosecutors, in turn, had the statutory duty to notify victims of the change in the offender's imprisonment status.<sup>58</sup> Nothing in the CTP had altered this prosecutorial duty.<sup>59</sup> Hence, there existed a clear procedure for providing victims with notice regarding an offender's transfer into the program.

Furthermore, the court noted that as a matter of basic equity law jurisprudence, the victims' claims for equitable relief were further barred because they did not fully exercise their rights at law, as evidenced by their admitted failure to request notice as required by statute.<sup>60</sup> Hence, the victims' action was dismissed not only because their articulated injuries did not fall within the scope of rights afforded to them under Indiana's victims' rights laws, but also because of their own failure to properly exercise their rights as detailed by statute.

While some might posit that *Newman* represented a blow to victims' rights in Indiana,<sup>61</sup> the result from *Newman* need not paint a wholly negative picture. First, in response to *Newman*, the Indiana legislature made changes to the CPT, directly addressing the victims' challenges in regard to the right to notice and the right to be heard. The revamped CTP details that victims must be given notice of an offender's potential release into the program and provides victims with an opportunity to submit a written statement to the sentencing court regarding the offender's potential release.<sup>62</sup> Moreover, while circumscribed to its particular facts, *Newman* represented the first time Indiana's victims' rights laws were invoked and tested, providing a natural forum to further examine Indiana's commitment and ability to enforce and protect victims' rights.

### III. A COMPARISON OF INDIANA VICTIMS' RIGHTS LAWS TO THOSE OF OTHER STATES

In light of the limited precedential power of *Newman*,<sup>63</sup> the effectiveness of

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58. See *id.* § 35-40-6-4(2).

59. See Findings of Fact and Conclusions of Law and Order Denying Inj. Relief and Dismissing Action, *Newman v. Ind. Dep't of Corr.*, 49D01-9910-CP-1431 (Jan. 18, 2000) at 11.

60. See *id.* at 12, 15-16. A victim's right to be informed about an offender's release or escape from custody, is contingent upon the victim requesting such information. See IND. CODE § 35-40-5-2; § 35-40-10-1 (2000). Indiana Code section 35-40-10-1 states that "[a] victim shall provide to and maintain with the agency that is responsible for providing notice to the victim a request for notice . . . . If the victim fails to keep the victim's . . . [contact information] current, the agency may withdraw the victim's request for notice." *Id.* § 35-40-10-1.

61. See Tim Starks, *Inmate-Move Law Survives Legal Test*, EVANSVILLE COURIER & PRESS, Jan. 20, 2000, at B3; Rick Thackeray, *Prosecutors Dealt Blow in War Against Community Transition Program*, IND. LAWYER, Feb. 2, 2000, at 5.

62. See IND. CODE § 11-10-11.5-4.5; § 11-10-8-9; § 35-38-1-24; § 35-38-1-25; § 35-50-1-7 (2000).

63. See Findings of Fact and Conclusions of Law and Order Den. Inj. Relief and Dismissing Action, *Newman v. Ind. Dep't of Corr.*, No. 49D01-9910-CP-1431, at 17 (Jan. 18, 2000).



Indiana's victims' rights laws might best be gauged through a comparison of similar laws from other states. In so doing, one can generally conclude that Indiana stands on par with most of its sister states in terms of the strengths and weaknesses of its victims' rights laws. Like other states, Indiana strives to reintegrate victims into the criminal justice system in a manner that recognizes their legitimate concerns, while remaining committed to the public prosecution model and the protection of defendant rights.<sup>64</sup> However, like many states, Indiana falls short of clearly identifying what methods should be employed to ensure that a victim's rights are not violated.

*A. Limited Nature of Victims' Rights Laws in Other States*

The strength of many states' victims' rights laws are immediately hampered by the absence of any direct method to remedy victims' rights violations, coupled with a lack of mandatory language to enforce those rights.

In many instances, courts faced with victims' rights claims have declined to create judicial remedies for the violations of victims' rights in the absence of controlling statutory or constitutional authority.<sup>65</sup> For example, in *Bandoni v. State*,<sup>66</sup> the victims of a drunk driving accident brought a cause of action seeking damages from the town of Coventry and the State of Rhode Island for failing to notify them of the defendant's plea to a lesser offense and subsequently reduced sentence.<sup>67</sup> The victims alleged that had they known of the defendant's plea, they would have "objected to the plea bargain and requested restitution" from the defendant.<sup>68</sup> While the court expressed sympathy for the victims and in no way condoned "the officials' failure to notify the victims of their rights,"<sup>69</sup> the court denied the victims' claim for damages on the ground that there was nothing within the Rhode Island victims' rights amendment or its supporting legislation which allowed victims to bring damage actions against state officials for failure to afford them their rights.<sup>70</sup> The court further noted that Rhode Island's

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64. See generally IND. CODE § 35-40-1-1; § 35-40-2-1 (2000).

65. See, e.g., *Gansz v. People*, 888 P.2d 256 (Colo. 1995); *State v. Adkins*, 702 So.2d 1115 (La. Ct. App. 1997); *State ex rel. Hillbig v. McDonald*, 839 S.W.2d 854 (Tex. App. 1992) (exemplifying cases in which courts were unwilling to recognize a victim's standing to bring a claim based upon a limited construction of each state's victims' rights laws).

66. 715 A.2d 580 (R.I. 1998).

67. See *id.* at 583.

68. *Id.*

69. *Id.* at 582.

70. See *id.* at 584-86. The Rhode Island victim's rights amendment states that [a] victim of crime shall, as a matter of right, be treated by agents of the state with dignity, respect and sensitivity during all phases of the criminal justice process. Such person shall be entitled to receive, from the perpetrator of the crime, financial compensation for any injury or loss caused by the perpetrator of the crime, and shall receive such other compensation as the state may provided [sic]. Before sentencing, a victim shall have the right to address the court regarding the impact which the



Victims' Rights Amendment and enabling legislation did not afford any remedies to victims for the violation of their rights, nor was the court willing to create a judicial remedy.<sup>71</sup>

Many victims' rights laws are also written in such a manner so that their command is permissive rather than mandatory. For example, Colorado's statute directs that "[a]fter a crime has been charged . . . the district attorney shall consult, *where practicable*, with the victim concerning the reduction of charges . . . or other disposition"<sup>72</sup> and that the "district attorney's office, *if practicable*, shall inform the victim of any pending motion that may substantially delay the prosecution."<sup>73</sup> North Carolina's statute creates an equally permissive tone by stating that

[t]o the extent *reasonably possible and subject to available resources*, the employees of law enforcement agencies, the prosecutorial system, the judicial system, and the correctional system should make a *reasonable effort* to assure that each victim and witness within their jurisdiction [receive rights afforded to them under the statute and amendment].<sup>74</sup>

Therefore, while these statutes contain language charging that the prosecuting attorney "shall" inform a victim of his or her rights, this language is tempered by permissive terms such as "where practicable" or "where reasonably possible," implying that compliance with the statute is favored, but not absolute.

### *B. Specific Limits Within Indiana's Victims' Rights Laws*

With complements to the framers of Indiana's victims' rights amendment and legislation, the force of Indiana's laws are not immediately tempered by permissive language and broad denials of remedial action. However, the law explicitly limits Indiana victims' attempts to seek redress for violation of their rights by three factors. First, victims cannot exercise their rights where doing so would "infringe upon the constitutional rights of the accused."<sup>75</sup> Second, victims

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perpetrator's conduct has had upon the victim.

R.I. CONST. art. I, § 23. Similarly, while the victims did have a right to be "informed by the prosecuting officer of the right to request restitution," R.I. GEN. LAWS § 12-28-3(a)(15) (2000), and the right to address the court in regard to a plea negotiation, *see* R.I. GEN. LAWS § 12-28-4.1 (2000), there is nothing within the language of these statutes to indicate that the state's failure to provide the victims with this right created a cause of action for damages on behalf of the victim.

71. *See Bandoni*, 715 A.2d at 585.

72. COLO. REV. STAT. § 24-4.1-303(4) (2000) (emphasis added).

73. *Id.* § 24-4.1-303(3) (emphasis added).

74. N.C. GEN. STAT. § 15A-825 (1999) (emphasis added). *See also* ALASKA STAT. § 12.61.010(b) (Michie 2000); FLA. STAT. ch. 960.001(2) (1996); MISS. CODE ANN. § 99-43-49 (1999); TEX. CRIM. PROC. ANN. § 56.02(c) (Vernon Supp. 2001); WASH. REV. CODE § 7.69.030 (2000); WIS. STAT. § 950.04(f)-(g) (2000).

75. IND. CONST. art I, § 13(b).



cannot "challenge a charging decision or a conviction, obtain a stay of trial, or compel a new trial"<sup>76</sup> in light of an alleged victims' rights violation. Finally, victims cannot bring a "claim for damages against the state of Indiana, a political subdivision, or any public official"<sup>77</sup> for failing to effectuate a victim's rights under the statute. Similar limits appear in numerous other state laws.<sup>78</sup>

1. *Victim's Inability to Intercede in Trial.*—Indiana's prohibition against victims' rights actions that would "challenge a charging decision or a conviction, obtain a stay of trial, or compel a new trial"<sup>79</sup> represents an important constraint to any victims' rights claim. To govern otherwise would represent a monumental shift of the victims' rights pendulum that only a few courts have been willing to acknowledge.<sup>80</sup> Permitting a victim to exercise such power within a criminal proceeding harkens back to actions brought under the private prosecution model, where the victim was a direct party to the proceeding, with rights to appeal or challenge the course of the prosecution.

The Maryland case, *Cianos v. State*,<sup>81</sup> provides a prime example of a court's reluctance to sanction such a dramatic shift in the structure of criminal law. In *Cianos*, victims were denied their opportunity to speak at a sentencing hearing.<sup>82</sup> In an effort to enforce their rights, the victims brought an action to have the Maryland Supreme Court vacate the sentence and remand the case back to the

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76. IND. CODE § 35-40-2-1(1) (2000).

77. *Id.* § 35-40-2-1(2).

78. See MD. CONST. art. 47(C); NEV. CONST. art. 1, § 8(3); TEX. CONST. art. 1, § 30(e); ARIZ. REV. STAT. § 13-4436A (2000); 725 ILL. COMP. STAT. § 120/9 (2000); S.C. CODE ANN. § 16-3-1565(B) (Law Co-op. Supp. 1999) (providing examples of state constitutional amendments and statutes which limit a victim's ability to intercede in the criminal proceedings to challenge a conviction or sentence). See also LA. CONST. art. I, § 25, N.C. CONST. art. I, § 37(2), MD. CONST. art. 47(C); MISS. CONST. art. 3, § 26(A)(2); MO. CONST. art. I, § 32.3; OHIO CONST. art. I, § 10(a); OR. CONST. art. I, § 42(2); UTAH CONST. art. I, § 28(2); VA. CONST. art. I, § 8-A; ALASKA STAT. § 12.61.015(c) (2000); LA. REV. STAT. ANN. § 46:1844(U) (West 1999); N.C. GEN. STAT. § 15A-839 (1999); S.C. CODE ANN. § 16-3-1565(C) (Law Co-op. Supp. 1999); TENN. CODE ANN. § 40-38-108 (1997); UTAH CODE ANN. § 77-38-11(3) (1999); WIS. STAT. § 950.10 (2000) (providing examples of state constitutional amendments and statutes which bar a victim from bringing a damage claim against the state or any of its agents for failing to provide victims rights). *But cf.* ARIZ. REV. STAT. § 13-4437.B (2000); UTAH CODE ANN. § 77-38-11 (1999); WIS. STAT. § 950.11 (2000). See also FLA. CONST. art. I, § 16(b); MISS. CONST. art. 3 § 26A(2); OR. CONST. art. I, § 42(2); VA. CONST. art. I, § 8-A; UTAH CODE ANN. § 77-38-12(4) (1999) (providing examples of state constitutional amendments and statutes which note that victims rights laws cannot undermine rights afforded to criminal defendants).

79. IND. CODE § 35-40-2-1 (2000).

80. See *In re K.P.*, 709 A.2d 315, 321 (N.J. Super. Ct. Ch. Div. 1997); *Sharp v. State*, 908 S.W.2d 752, 755-56 (Mo. Ct. App. 1995).

81. 659 A.2d 291 (Md. 1995).

82. See *id.* at 292. Maryland's victims' rights amendment states in part that "a victim of crime shall have the right . . . to be heard at a criminal justice proceeding." MD. CONST. art 47(B).



trial court for resentencing.<sup>83</sup> While the Maryland Supreme Court acknowledged that the victims' right to be heard at sentencing was violated, it nonetheless denied their request for a new sentencing hearing.<sup>84</sup> First, the court noted that the only individuals who can appeal a final order or conviction are those who were parties to the case (in this instance, the defendant and the state).<sup>85</sup> Moreover, the court noted that

even if the . . . [victims] had applied for leave to appeal prior to the final judgment in this case, such action would not have stayed the criminal proceedings against . . . [the defendant]. An appeal by a victim is collateral to and may not interrupt a criminal case, and such an appeal cannot result in a reversal of the judgment and a reopening of the case.<sup>86</sup>

Finally, the court examined the legislative history surrounding the passage of Maryland's victims' rights laws and determined that the legislature did not intend to allow victims to seek to invalidate a defendant's sentence.<sup>87</sup> Hence, as was borne witness in *Cianos*, while the obvious (though not necessarily legally sanctioned) remedy to an acknowledged victim's rights violation might include a stay of the proceedings or a challenge to a conviction or sentence, most state legislatures and courts prohibit such action on the part of the victim.<sup>88</sup>

2. *Limits on a Victim's Standing to Bring a Claim.*—As *Newman* clearly exhibited, victims' tend to have limited standing rights. Indiana's victims' rights statute articulates that a "victim has standing to assert the rights established by this article."<sup>89</sup> As evidenced in *Newman*, the scope of standing is strictly limited to the rights articulated in the statute and in the victims' rights amendment.<sup>90</sup>

The *Newman* court's approach to victim standing is comparable to decisions

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83. See *Cianos*, 659 A.2d at 293.

84. See *id.* at 294.

85. See *id.* at 293.

86. *Id.* at 293-94.

87. See *id.* at 294. The court nonetheless noted that the victims' rights had been violated by the trial court's decision not to allow them to speak the sentencing, and hence determined that the victims were not required to pay the court costs for the action. See *id.* at 295.

88. Accordingly, Indiana's victims' rights statute prohibits a victim from challenging a "charging decision or a conviction, obtain[ing] a stay of trial, or compel[ling] a new trial." IND. CODE § 35-40-2-1(1) (2000). It does not, however, contain any specific language limiting victims' action in sentencing hearings. Therefore, under Indiana law, more room may exist for victims to challenge a sentence.

89. *Id.* § 35-40-2-1.

90. In *Newman*, because the CTP represented an alternative form of imprisonment for offenders rather than a form of post-conviction release, it did not fall within the ambit of Indiana's victims' rights legislation. Hence, the victims lacked standing to challenge the constitutionality of the program. See Findings of Fact and Conclusions of Law and Order Den. Inj. Relief and Dismissing Action, *Newman v. Ind. Dep't of Corr.*, No. 49D01-9910-CP-1431, at 13 (Jan. 18, 2000).



rendered in other states. For example, in *Gansz v. People*,<sup>91</sup> the Colorado Supreme Court was presented with a case in which a prosecuting attorney moved to dismiss an assault charge on the ground that the charge could not be proven beyond a reasonable doubt.<sup>92</sup> The trial court initially dismissed the case without a hearing, but after the victim complained, the trial judge ordered a hearing where he determined that the victim lacked standing to challenge the dismissal of the case.<sup>93</sup> On appeal, the Colorado Supreme Court noted that victims have the right to be present at and informed of all critical stages in the criminal justice process,<sup>94</sup> and the right to be heard at any "court proceeding which involves a bond reduction or modification, the acceptance of a negotiated plea agreement, or the sentencing of any person accused or convicted of a crime" against the victim.<sup>95</sup> However, the court emphasized that Colorado law did not extend a victim's standing to challenge a district attorney's decision to dismiss an action against a defendant.<sup>96</sup>

*State ex rel. Hilbig v. McDonald*<sup>97</sup> provides an additional example of how courts limit victim standing based on the expressed intent and scope of victims' rights laws. In this case, parents of a sexual assault victim brought an action to gain access to the prosecuting attorney's files to aid in a civil suit the parents were filing against the defendant.<sup>98</sup> The Texas Court of Appeals rejected the victim's assertion of standing, determining instead that "a crime victim does not have a constitutional or statutory right to discover evidence regarding the pending criminal case that is contained within the prosecutor's file."<sup>99</sup> Rather, the intent of Texas' victims' rights amendment and enabling legislation was to "give victims access to the prosecutor—not to the prosecutor's file."<sup>100</sup> Similarly, in *State v. Adkins*,<sup>101</sup> the father of a murder victim filed a motion under Louisiana's victims' rights amendment requesting that the court recuse one of the prosecuting attorneys on the case.<sup>102</sup> The court determined that the father did not have standing to bring such an action, noting that while Louisiana law gave victims' families the right

'to attend any hearing or trial pertaining to the offense which caused [them] . . . to become a victim,' it . . . does not give them any right to

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91. 888 P.2d 256 (Colo. 1995).

92. *See id.* at 257.

93. *See id.*

94. *See id.* at 258; *see also* COLO. REV. STAT. § 24-4.1-302.5(1)(c) (2000).

95. *Gansz*, 888 P.2d at 258 (quoting COLO. REV. STAT. § 24-4.1-302.5(1)(d) (2000)).

96. *See id.* at 258-59.

97. 839 S.W.2d 854 (Tex. App. 1992).

98. *See id.* at 856.

99. *Id.*

100. *Id.* at 859. Texas victims' rights laws articulate that victims have the right to "confer with a representative of the prosecutor's office." TEX. CONST. art. 1 § 30(b)(3).

101. 702 So. 2d 1115 (La. Ct. App. 1997).

102. *See id.* at 1116.



determine who is in charge of the investigation and/or the prosecution or when the person or persons charged are brought to trial.<sup>103</sup>

As these Colorado, Louisiana and Texas cases illustrate, courts tend to exercise great care in examining victims' rights claims and strictly limit a victim's standing to the rights detailed in their respective state constitutions. However, not all courts approach victim standing with complete austerity.

The state of Arizona fluctuates in its treatment of victim standing. For example, in *State v. Lamberton*,<sup>104</sup> a victim filed a petition opposing the trial court's grant of the defendant's motion for post conviction relief.<sup>105</sup> In examining whether the appellate court's decision to dismiss the victim's petition for review was in error, the Arizona Supreme Court determined that the victim did not have standing to bring her action.<sup>106</sup> While the court acknowledged that under Arizona law victims have the right to be heard at criminal proceedings, it stated that "we cannot conclude that victims are 'parties' with the right to file their own petitions for review."<sup>107</sup> Rather, in order for the victim to have standing to challenge the action of the trial court, she would have to assert relief for rights denied to her.<sup>108</sup> For example, if the victim were denied the right to "be informed . . . when the accused or convicted person . . . [was] released from custody or has escaped"<sup>109</sup> or denied the right to "be heard at any proceeding involving a post-arrest release decision, a negotiated plea . . . [or] sentencing"<sup>110</sup> hearing, the victim would have standing to bring her claims. However, in this action, while the victim was displeased that the court granted the defendant's motion for post-conviction relief, Arizona law did not give her standing to challenge the trial court's ruling.<sup>111</sup>

In contrast to the decision handed down by the Arizona Supreme Court in *Lamberton*, the Arizona Court of Appeals took a different approach when a victim's restitution rights were at issue.<sup>112</sup> In *FDIC v. Colosi*, a theft victim brought a special action seeking relief from a sentencing court's refusal to enter judgment against the defendant who, during his probationary period, failed to pay

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103. *Id.* at 1119.

104. 899 P.2d 939 (Ariz. 1995).

105. *See id.* at 940. After granting the defendant's request for post conviction relief, the trial court set a date for resentencing, which both the victim and the state sought to stay through appeals. *See id.* The appellate court rejected the victim's petition for review on the ground that the appellate court did not have jurisdiction over the victim's claim as she was not an "aggrieved party" to the criminal proceeding. *Id.* The Arizona Supreme Court allowed the victim to bring a petition for review as to the issue of standing. *See id.*

106. *See id.*

107. *Id.* at 941.

108. *See id.* at 942.

109. ARIZ. CONST. art. 2, § 2.1(A)(2).

110. ARIZ. CONST. art. 2, § 2.1(A)(4).

111. *See Lamberton*, 899 P.2d at 942.

112. *See FDIC v. Colosi*, 977 P.2d 836 (Ariz. Ct. App. 1998).



court-ordered restitution to the victim.<sup>113</sup> The *FDIC* court noted that because the victim was not a party to criminal-adjudicatory process the victim had no adequate remedy by way of appeal against the sentencing court's initial ruling. Therefore, in order to protect the victim's restitution rights, the court deemed it appropriate to allow the victim to bring a special action challenging the lower court's decision.<sup>114</sup> Hence, where a victim's restitution rights were at issue, the Arizona court was willing to let the victim bring an action in a judicial context traditionally reserved to the state and defendant.

The New Jersey courts have given even further breadth to the boundaries of victim standing. In *In re K.P.*,<sup>115</sup> the State of New Jersey, on behalf of a juvenile victim of a juvenile offender, sought to exclude the press from the courtroom during the juvenile proceedings.<sup>116</sup> The State argued that New Jersey's victims' rights amendment required the "court to consider the victim's position when the court is ruling on an issue that [will] affect a victim as well as the juvenile defendant."<sup>117</sup> Concurring with, and expounding upon the State's arguments, the New Jersey court cited to language in New Jersey's victims' rights amendment, which states that "[a] victim of crime shall be treated with fairness, compassion and respect by the criminal justice system,"<sup>118</sup> and determined that the amendment was self-executing and provided the victim with standing to protect her constitutional rights.<sup>119</sup> The court further reasoned that the victim's right to be treated with fairness, compassion, and respect would be directly affected by the presence of the press in the courtroom, and therefore the victim should be afforded the opportunity to have the proceedings closed.<sup>120</sup> In so holding, the court acknowledged that New Jersey's victims' rights amendment marked a "fundamental change in the criminal justice system. Instead of adopting a two-party State v. Defendant, [sic] paradigm, this provision requires that the system consider interests of third parties, specifically crime victims."<sup>121</sup>

In observing how other state courts have dealt with the issue of victim standing, the result in *Newman* is not necessarily surprising. By and large, courts appear reluctant to grant standing when to do so allows victims to bring actions that fall outside of the articulated rights granted under state victims' rights

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113. See *id.* at 837. The Arizona Constitution states that a victim of crime has a right "[t]o receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury." ARIZ. CONST. art. II, § 2.1(A)8.

114. See *FDIC*, 977 P.2d at 838.

115. 709 A.2d 315 (N.J. Super. Ct. Ch. Div. 1997).

116. See *id.* at 316.

117. *Id.* at 321.

118. N.J. CONST. art I, para. 22.

119. *In re K.P.*, 709 A.2d at 324-25.

120. See *id.* at 325.

121. *Id.* at 321.



amendments or statutes. *Lamberton*,<sup>122</sup> *Gantz*,<sup>123</sup> and *McDonald*<sup>124</sup> all bear tribute to such a limited approach. However, where a victim seeks to compel or limit court action which is directly or impliedly connected to the rights afforded to them by law, or where granting such rights does not undercut the defendant's rights or fully supplant the victim into the prosecutorial role of the state, courts appear more willing to accept a victim's claim of standing.<sup>125</sup>

In *Newman*, the CTP was defined by statute as a form of imprisonment rather than a post-conviction release.<sup>126</sup> Therefore, it did not fall within the scope of the victims' constitutional rights, consequently precluding any victims' rights challenge to the CTP.<sup>127</sup> However, it remains to be determined whether victim standing issues will always be addressed in such a guarded manner in Indiana. If presented with the right set of facts, the Indiana courts might follow the lead of the New Jersey court<sup>128</sup> and decide that because victims "shall have the right to be treated with fairness, dignity and respect throughout the criminal justice process,"<sup>129</sup> practices that deny crime victims fairness, dignity and respect are unconstitutional and can be challenged. Moreover, if the victim is seeking to protect his restitutionary rights, Indiana courts, like those in Arizona,<sup>130</sup> might be willing to acknowledge victim standing in such matters.

3. *A Victim's Right to Notice*.—Beyond the threshold question of standing, a victim's right to notice coupled with the right to be heard, raise numerous enforcement challenges. The connection between these two rights is important, for the failure to provide victims with their notice rights can lead to additional rights violations. For example, a victim's ability to exercise his or her rights to be heard at a sentencing hearing<sup>131</sup> is directly contingent upon the victim's knowledge of that right<sup>132</sup> and the victim's knowledge of the date and time of the sentencing hearing.<sup>133</sup> Therefore, it is exceedingly important that victims' notice rights are provided and enforced.

Indiana's victims' rights statute takes great pains to clearly delineate who is responsible for ensuring that a victim's notice rights are satisfied. Within this

122. 899 P.2d 939 (Ariz. 1995).

123. 888 P.2d 256 (Colo. 1995).

124. 839 S.W.2d 854 (Tex. App. 1992).

125. See *supra* notes 111-12 and accompanying text.

126. See *supra* note 57 and accompanying text.

127. *Newman v. Ind. Dep't of Corr.*, No. 49D01-9910-CP-1431 (Marion Super. Ct., Ind. dismissed, Jan. 18, 2000).

128. See *In re K.P.*, 709 A.2d 315 (N.J. Super. Ct. Ch. Div. 1997).

129. IND. CONST. art. I, § 13(b).

130. See *FDIC v. Colost*, 977 P.2d 836 (Ariz. Ct. App. 1998).

131. See, e.g., IND. CODE § 35-40-5-5 (2000) (stating victims have right to be heard at any proceeding involving sentencing or postconviction release decision).

132. See, e.g., *id.* § 35-40-5-9 (stating victims have the right to be informed of constitutional and statutory rights).

133. See, e.g., *id.* § 35-40-6-4 (providing that prosecutor's office or victims' assistance program shall timely notify the victim of all criminal justice hearings and proceedings).



statutory construct, victims must take an active role in protecting their rights by providing and maintaining a current address and phone number with the variety of agencies responsible for providing notice to the victim.<sup>134</sup> Hence, victims must actively seek to have their rights enforced, rather than passively expecting the rights to be bestowed upon them. However, once a victim has exercised the statutory duty to request notice, the statute shifts the burden of notice duties to prosecutor's offices, victim assistance programs, courts, and custodial bodies.

The prosecutor's office, and any victim assistance program under its authority<sup>135</sup> has the obligation to ensure that victims are "treated with dignity [and] respect, and . . . [that their] rights . . . are protected."<sup>136</sup> In particular, the prosecutor's office or victims' assistance program must inform a victim that the victim may be

present at all public stages of the criminal justice process . . . timely notify a victim of all criminal justice hearings and proceedings that are scheduled for a criminal matter in which the victim was involved[,] promptly notify a victim when a criminal court proceeding has been rescheduled or canceled . . . [and] [i]nform the victim that the court may order a defendant convicted of the offense involving the victim to pay restitution to the victim . . . .<sup>137</sup>

Additionally, the prosecuting attorney or victims' assistance program must inform the victim of his or her rights under Indiana law,<sup>138</sup> the specific criminal offense for which the defendant was convicted or acquitted,<sup>139</sup> or notice that the charges were dismissed against the defendant accused of committing the offense against the victim,<sup>140</sup> and the terms and conditions of release of the person accused of committing a crime against the victim.<sup>141</sup> Likewise, if the defendant is convicted, and the victim has so requested, the prosecutor or victims' assistance program must notify the victim of his or her rights during the sentencing phase of trial including the time, place, and date of the sentencing

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134. See IND. CODE § 35-40-10-1 (2000). Several other states place a similar level of responsibility upon crime victims. See, e.g., COLO. REV. STAT. § 24-4.1-302.5(1)(q)-(r) (2000); CONN. GEN. STAT. § 51-286e(b) (2000); LA. REV. STAT. ANN. § 46:1844B (West 1999 & Supp. 2001); MD. CODE ANN. CORR. SERV. § 7-801(b) (West 1999); NEB. REV. STAT. § 81-1849 (2000); NEB. REV. STAT. § 81-1850 (2000); N.C. GEN. STAT. § 15A-825(11)-(12) (1999); TENN. CODE ANN. § 40-38-103(a) (1997); TEX. CRIM. PROC. CODE ANN. § 56.08(b) (Vernon Supp. 2001); TEX. CRIM. PROC. CODE ANN. § 56.11(d) (Vernon Supp. 2001); TEX. CRIM. PROC. CODE ANN. § 56.12(b) (Vernon Supp. 2001); VA. CODE ANN. § 19.2-11.01A.3.e (Michie 2000).

135. In Indiana, the prosecutor's office can contract with an outside agency to provide victim assistance services. See IND. CODE § 35-40-6-4 (2000).

136. *Id.* § 35-40-6-2.

137. *Id.* § 35-40-6-4.

138. See *id.* § 35-40-6-4(11).

139. See *id.* § 35-40-6-4(8)(A).

140. See *id.* § 35-40-6-4(8)(B).

141. See *id.* § 35-40-6-4(7).



proceeding.<sup>142</sup> If the defendant seeks appellate review or attacks his conviction, the "prosecuting attorney or the office of the attorney general . . . shall inform the victim . . . of the status of the case and of the decision of the court."<sup>143</sup> Finally, where the victim has requested, the prosecutor or

law enforcement agency having custody of a person accused of a crime against the victim shall notify the victim of the scheduling of the bond hearing, the escape or death of a person accused of committing a crime against the victim, release of a person convicted of a crime against the victim to a work release program, or any other type of postarrest release of a person convicted of a crime against the victim.<sup>144</sup>

Indiana's victims' rights statute also imposes notice duties on law enforcement agencies who exercise custodial duties over defendants and convicted persons.<sup>145</sup> "The law enforcement agency having custody of a person accused of committing a crime against a victim shall notify the victim if the accused person escapes from . . . custody . . . ."<sup>146</sup> This notice must be given "before the person is released by the law enforcement agency, if possible; or as soon as practicable after the person escapes or has been released by the law enforcement agency."<sup>147</sup>

Courts have similar notice duties under the statute.<sup>148</sup> "Upon request of a victim, a criminal court shall notify the victim of any probation revocation disposition proceeding or proceeding in which the court is asked to terminate the probation of a person who is convicted of a crime against the victim."<sup>149</sup> However, where a probation order against a defendant is modified, the court need only notify the victim if "the modification will substantially affect the person's contact with or safety of the victim; or the modification affects the person's restitution or confinement status."<sup>150</sup> Similar notice must be given to the victim if the defendant is released, discharged or has escaped from a mental health treatment agency.<sup>151</sup>

While other states may not allocate the responsibility for victim notice rights in exactly the same manner as Indiana, they nonetheless require similar levels of

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142. *See id.* § 35-40-6-7.

143. *Id.* § 35-40-6-10.

144. *Id.* § 35-40-7-2.

145. *See id.* §§ 35-40-7-1 to -3.

146. *Id.* § 35-40-7-1.

147. *Id.* § 35-40-7-3.

148. *See id.* §§ 35-40-8 to -9.

149. *Id.* § 35-40-8-1.

150. *Id.* § 35-40-8-2.

151. *See id.* § 35-40-9-1. Generally, if a victim has requested notice upon the release of a defendant from a mental health treatment agency, the agency must provide notice to the court, and then court must give the victim notice no later than ten days before the discharge or release of the defendant. *See id.*



notice to victims.<sup>152</sup> However, despite the breadth or particularity of a given state's victim notice requirements, the violation of these rights (whether they be unintentional or otherwise) can directly impede upon a victim's other rights, compounding the difficult question of how to remedy such violations.

Some courts have displayed great flexibility in their attempts to find ways to redeem victim notice rights violations. For example, victims in Alabama have the "right to be notified by the Board of Pardons and Paroles and allowed to be present and heard at a hearing when parole or pardon is considered pursuant to"<sup>153</sup> Alabama's pardons and parole law. In a recent unreported case, the Alabama Board of Pardons and Paroles failed to notify a rape victim of a parole hearing for one of the two men convicted of raping her, and the man was released.<sup>154</sup> Judge Charles Price ruled that the Alabama Board of Pardons and Paroles violated state law when it did not notify the rape victim of the hearing, and ordered that the parole board rescind the defendant's parole and schedule a new hearing.<sup>155</sup> Similarly, in *State ex rel. Hance v. Arizona Board of Pardons and Paroles*,<sup>156</sup> the Arizona Court of Appeals ordered that the results of a parole hearing for a convicted rapist be set aside, as the victim of the crime was not informed of the hearing, nor of her right to even request notice of the hearing.<sup>157</sup> The court stated that the parole board

cannot use the victim's failure to request notice as a defense against the victim's right to appear at the release proceeding because the state failed to first fulfill its constitutional obligation to inform her of that right. The constitutional mandate is clear: victims must be informed of their rights. Armed with this knowledge, victims may choose to exercise these rights. Conversely, an uninformed victim may not exercise her rights because she is unaware of them, or unaware that the right to notice of a release hearing requires that she first file a request for such notice.<sup>158</sup>

The court continued, noting that

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152. See, e.g., ALASKA STAT. § 12.61.015(a)(2) (Michie 2000); CAL. PENAL CODE § 679.03 (West 1999); LA. REV. STAT. ANN. § 1844.A (West 1999 & Supp. 2001); S.C. CODE ANN. § 16-3-1530 (Law Co-op. Supp. 1999); TEX. CRIM. PROC. CODE ANN. § 56.08 (Vernon Supp. 2001); TEX. CRIM. PROC. CODE ANN. § 56.11 (Vernon Supp. 2001); TEX. CRIM. PROC. CODE ANN. § 56.12 (Vernon Supp. 2001); UTAH CODE ANN. § 64-13-14.7(2)-(4) (1999); UTAH CODE ANN. § 77-38-3 (1999).

153. ALA. CODE § 15-23-79(b) (2000).

154. See Bob Johnson, *Montgomery Judge Orders Paroles of Convicted Rapists to Be Null and Void*, A.P. NEWSWIREs, Aug. 11, 2000.

155. See *id.*

156. 875 P.2d 824 (Ariz. Ct. App. 1993).

157. See *id.* at 832. Under Arizona law, a victim has the right to be "informed of victims' constitutional rights." ARIZ. CONST. art. 2, § 2.1(A)12. The victim also has the right to "be heard at any proceeding when any post-conviction release from confinement is being considered." *Id.* § 2.1(A)9.

158. *Hance*, 875 P.2d at 830.



[t]he issue is whether the victim received that which the constitution guarantees: reasonable efforts by the state to notify her of her constitutional rights and, in particular, the right to participate in the post-conviction release process . . . . We decide today only that the constitution gives victims the right to be notified and that this victim's right to notification was violated.<sup>159</sup>

However, not all states have addressed the enforcement of victims' notification rights in such a pro-victim manner. In a controversy raising similar notice issues as to those arising in *Newman*,<sup>160</sup> the State of Kansas brought an action on behalf of victims who were not given notice of a defendant's probation hearing.<sup>161</sup> The State argued that the results of the probation hearing should be revoked because the victims were not provided with their right to notice and hence were not present at the probation hearing.<sup>162</sup> The court rejected the State's claims, remarking that Kansas' victims' rights legislation was not mandatory, but rather directive, and lacked any enforcement mechanism.<sup>163</sup> The court further noted that while the victims' rights statute provided victims with the right to notice for public hearings, including preliminary hearings, trials, sentencing, and sentencing modifications, the right to notice did not extend to probation hearings.<sup>164</sup> The court also noted that while both parties had consistently referred to the "probation" hearing of the defendant, the legally correct term was "parole."<sup>165</sup> This definitional clarification gave further weight to the court's final conclusion.

There is nothing in our constitutional, statutory, or case law which requires a public hearing or holds that 'the accused or the convicted person has the right to appear and be heard' at the granting of a parole to a misdemeanor. The granting of a parole to a misdemeanor defendant who has served a portion of the jail sentence imposed is purely discretionary with the trial court as is the holding of any hearing in connection therewith.<sup>166</sup>

Therefore, while the victims had an interest in knowing that the defendants were being considered for parole, the parole board was under no obligation to inform the victims of the hearing.

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159. *Id.* at 831.

160. *Newman v. Ind. Dep't of Corr.*, No. 49D01-9910-CP-1431 (Marion Super. Ct., Ind. dismissed, Jan. 18, 2000).

161. *See State v. Holt*, 874 P.2d 1183 (Kan. 1994).

162. *See id.* at 1184. The State argued that victims had the right to be informed of the probation hearing and to be afforded the right to be heard. *See* KAN. CONST. art. 15, § 15; KAN. STAT. ANN. § 74-7333 (1992).

163. *See id.*

164. *See id.* at 1186.

165. *Id.*

166. *Id.* at 1187.



While the construction of the parties in *State v. Holt* differed somewhat from those in *Newman*, the underlying issue remained the same. In *Holt*, the particular question was whether the victims had a right to notice of the probation hearings.<sup>167</sup> In comparison, the *Newman* case queried whether a victim had a right to notice of an offender's transfer into the CTP.<sup>168</sup> In both cases, the courts determined that a victim's right to notice did not include either a probation hearing or alternative imprisonment programs; hence, there was no violation of the victim's rights.

An even more interesting comparison can be drawn from the *Holt* and *Newman* controversies. Both cases, regardless of their legal conclusions, highlighted their respective states' concern and commitment to victims' rights. Despite the *Holt* court's rejection of the plaintiff's claims, it did acknowledge the growing force and intent of the victims' rights movement stating that the

right of the public in general, and victims in particular, to open access to the courts is to be encouraged. We recommend that trial judges carefully consider holding a public hearing and notifying crime victims in cases where the court deems it advisable and when it can be accomplished without undue burden on the judicial system.<sup>169</sup>

Moreover, in 1997, Kansas expanded the notification rights of victims so that probation hearings were included within the definition of a public hearing.<sup>170</sup> Similarly, one of the important effects of the *Newman* case was that the Indiana General Assembly amended the CTP to require victims be given direct notice of an offender's eligibility for the program, and the ability to submit a written statement to the sentencing court regarding the offender's eligibility.<sup>171</sup>

In California, a victim's right to notice has received varying treatment. For example, the result of *People v. Superior Court*<sup>172</sup> exemplifies how a victim's attempt to enforce her notice rights were thwarted by the permissive nature of the state's victims' rights laws, coupled by her inability to intercede in the criminal trial. In this case, a battery victim was not given notice of the sentencing hearing for the defendant, and therefore sought to vacate the court's judgment and have the defendant's probation order set aside.<sup>173</sup> In rejecting the victim's prayer for relief, the California Court of Appeals noted that it did not have the authority to

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167. See *id.* at 1184.

168. See *Newman v. Ind. Dep't of Corr.*, No. 49D01-9910-CP-1431, at 12-13 (Marion Super. Ct., Ind. *dismissed*, Jan. 18, 2000).

169. *Holt*, 874 P.2d at 1187-88.

170. See KAN. STAT. ANN. § 74-7335(b) (1992). Chapter 74, article 73 of the Kansas Code currently reads "the victim of a crime . . . shall be notified of the right to be present at any proceeding or hearing where probation or parole is considered or granted by a judge whether or not a public hearing is conducted or required." *Id.*

171. See IND. CODE §§ 11-10-11.5-4.5, 11-10-8-9, 35-38-1-24, 35-38-1-25, 35-50-1-7 (2000); see also *supra* note 62 and accompanying text.

172. 154 Cal. App. 3d 319 (1984).

173. See *id.* at 320.



grant the victim any relief, as the victims' rights amendment and supporting statutes were directory as opposed to mandatory.<sup>174</sup> Moreover, the court stated that "[t]he failure of the probation officer to comply with that officer's duty to notify the crime victim of the probation and sentencing hearing, and the resultant absence of the victim at such hearing, does not deprive the trial court of its jurisdiction to proceed."<sup>175</sup> However, the California judiciary adopted a different stance in *Melissa J. v. Superior Court*.<sup>176</sup> In *Melissa J.*, a defendant was initially ordered to pay restitution to a sexual assault victim for counseling services.<sup>177</sup> The trial court later terminated the restitution requirement of the defendant's sentence but did not inform the victim.<sup>178</sup> Distinguishing its holding from *People v. Superior Court*, the court reasoned that there was a difference between an initial sentencing hearing and a hearing concerning restitution rights.<sup>179</sup> "Proper determination of restitution rights cannot take place without notice and an opportunity for the victim to be heard. Thus, as to restitution, the notice and right to appear requirements are mandatory. If the requirements are not satisfied, the victim may challenge a ruling regarding restitution."<sup>180</sup> In a comparable manner to how the Arizona courts have addressed victim standing,<sup>181</sup> these California cases highlight a trend in which the courts are more comfortable enforcing victim notice rights where the underlying concern is restitution, rather than where victim notice impacts other victim concerns.

4. *Victim's Right to Be Heard*.—Closely related to a victim's right to notice, is the right to be heard.<sup>182</sup> Under Indiana law, victims have the right to be heard in any proceeding involving sentencing or post-conviction release decisions.<sup>183</sup>

174. See *id.* at 321-22.

175. *Id.* at 322.

176. 190 Cal. App. 3d 476 (1987).

177. See *id.* at 476-77.

178. See *id.* at 477-78.

179. See *id.*

180. *Id.* at 478.

181. See *supra* notes 111-13 and accompanying text.

182. A victim's right to be heard at capital sentencing hearings was first accepted by the United States Supreme Court in *Payne v. Tennessee*, 501 U.S. 808 (1991), in which the Court held that the Eighth Amendment of the United States Constitution was not violated by the use of a victim-impact statement during the sentencing stage of a federal trial. The holding in *Payne* was later extended to state capital trials in *State v. Gentry*, 888 P.2d 1105 (Wash. 1995).

183. IND. CODE § 35-40-5-5 (2000). Similar statutory provisions exist in other states. See, e.g., ALA. CODE § 15-23-74 (1995); ALASKA STAT. § 12.61.010(8) (Michie 2000); ARIZ. REV. STAT. § 13-4424 (2000); ARIZ. REV. STAT. § 13-4426 (2000); CAL. PENAL CODE § 679.02(a)(3) (West 1999); COLO. REV. STAT. § 24-4.1-302.5(d) (2000); FLA. STAT. ch. 960.001(1)(a)5 (2000); IDAHO CODE § 19-5306(1)(e) (Michie 1997); 725 ILL. COMP. STAT. 120/4(a)(4) (2001); LA. REV. STAT. ANN. § 1844.K (West 1999 & Supp. 2001); MASS. GEN. LAWS ch. 258B, § 3(p) (2000); MISS. CODE ANN. § 99-36-5(1)(e) (1999); MO. REV. STAT. § 595.209.1(4) (2001); N.J. STAT. ANN. § 52:4B-36n (West Supp. 2000); N.M. STAT. ANN. § 31-26-4.G (Michie Supp. 2000); OKLA. STAT. tit. 19, § 215.33.11 (2000); TEX. CRIM. PROC. CODE ANN. § 56.02(a)(5) (Vernon Supp. 2001);



However, except for the limited examination of this right provided in *Newman*,<sup>184</sup> this right has not been subjected to extensive judicial scrutiny, nor a full consideration as to the best method of enforcement.

When victims in other states have sought to enforce their right to be heard, the results have varied. For example, in *People v. Pfeiffer*,<sup>185</sup> victims were initially denied the opportunity to be present and address the court during the sentencing hearing for a defendant convicted of sexual misconduct.<sup>186</sup> In an effort to ensure that the victims were given an opportunity to be heard, the trial court conducted a second sentencing hearing. At this hearing, the victims addressed the court, and the defendant subsequently received a longer sentence.<sup>187</sup> On the defendant's appeal, the appellate court reinstated the original sentence, reasoning that while the victims had the right to be heard at sentencing, the trial court's initial failure to provide those rights did not permit the victims to seek to set aside the sentence.<sup>188</sup> The court noted that "the Crime Victims's Rights Act does not purport to confer general remedial rights on victims or prosecutors, and has therefore not provided the necessary legal exception to the rule that a court may not modify a valid sentence."<sup>189</sup> Hence, despite a clear violation of the victims' rights, the court flatly denied them any opportunity to redress this wrong.

Conversely, in *Sharpe v. State*,<sup>190</sup> a defendant's challenge to the appropriateness of a victim's statement at sentencing was struck down by the Missouri court.<sup>191</sup> In *Sharpe*, a defendant pled guilty to involuntary manslaughter in a drunk driving accident in exchange for the prosecution's agreement, in part, to remain silent on the issue of punishment. At sentencing the prosecution remained silent, but the victim addressed the court, and requested that the defendant be "prosecuted to the fullest extent that the law will allow."<sup>192</sup> The defendant argued that the victim's statement violated the plea agreement. The court disagreed, stating that when the victim requested that the defendant be

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UTAH CODE ANN. § 77-27-9.5(4)(b) (1999); UTAH CODE ANN. § 77-38-4(1) (1999); VA. CODE ANN. § 19-2-11.01.A.4 (Michie 2000); WASH. REV. CODE § 7.69.030(13) (2001); WIS. STAT. § 950.04(m) (2000).

184. See *supra* Part II.B.

185. 523 N.W.2d 640 (Mich. Ct. App. 1994).

186. See *id.* at 641.

187. See *id.* at 642.

188. See *id.* at 642-43. The court determined that the language of chapter 780 of the Michigan Code which stated that "[t]he failure to provide a right, privilege, or notice to a victim under this article shall not be grounds for the defendant to seek to have the conviction or sentence set aside" was not "intended to address a victim's right to seek resentencing, or to create such a right where no such right previously existed." *Id.* at 643 (quoting MICH. COMP. LAWS § 780.774 (1998)).

189. *Id.*

190. 908 S.W.2d 752 (Mo. Ct. App. 1995).

191. See *id.* at 754.

192. *Id.* See also MO. CONST. art. I, § 32.1(2); MO. REV. STAT. § 595.209.1(4) (2001).



punished to the "fullest extent that the law will allow,"<sup>193</sup> she was not speaking as a party for the state, but rather on her own behalf.<sup>194</sup> In so holding, the *Sharpe* court implicitly acknowledged that the interests of a third party, the victim, had to be honored in the proceeding, representing at least one court's contribution towards shifting the victims' rights pendulum to a new more victim-friendly place.

The effectiveness and enforceability of Indiana's victims' rights laws have not yet been tested to the extent of similar laws in other states. However, the particularized result of *Newman*, coupled with an examination of victims' attempts to enforce their rights in other states, indicates that while the extent of victims' rights in Indiana is comparable to those in other states, an Indiana victim's ability to seek a judicial remedy for the violation of those rights may be limited. The foregoing discussion, while by no means an exhaustive comparison of Indiana's victims' rights laws with those in other states, nonetheless highlights how the judicial enforcement of victims' rights tends to be varied and circumstantial, with victims finding more success when their restitution interests are at stake than when other rights are being championed.

#### IV. ENFORCEMENT MECHANISMS FOR VICTIMS' RIGHTS

In light of the projection that a victim will have only a varying ability to judicially enforce his or her constitutional and statutory rights, the Indiana legislature should take additional steps to ensure that a variety of enforcement mechanisms exist to protect victims' rights. Several states have taken such steps by establishing a number of different methods for victims to enforce their rights.

A few states do allow victims to seek direct redress from a state actor for the violation of their rights. In Wisconsin, a "public official, employee or agency that intentionally fails to provide a right specified under [the bill of rights for victims and witnesses] to a victim of a crime may be subject to a forfeiture of not more than \$1,000."<sup>195</sup> Arizona's victims' rights statute also includes a provision which reads that "[a] victim has the right to recover damages from a governmental entity responsible for the intentional, knowing or grossly negligent violation of the victim's rights under the victims' bill of rights, article II, § 2.1, Constitution of Arizona, any implementing legislation or court rules."<sup>196</sup> Finally, in Illinois, while a victim cannot bring a civil action against a state employee who

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193. *Sharpe*, 908 S.W.2d at 754.

194. *See id.* at 755-56.

195. WIS. STAT. § 950.11 (2000).

196. ARIZ. REV. STAT. § 13-4437.B (2000). Utah law contains a similar provision, reading [i]f a person acting under color of state law willfully or wantonly fails to perform duties so that the rights . . . [of crime victims] are not provided, an action for injunctive relief, including prospective injunctive relief, may be brought against the individual and the governmental entity that employs the individual.

UTAH CODE ANN. § 77-38-11(1) (1999).



fails to comply with the state's victims' rights laws,<sup>197</sup> the Illinois courts have nonetheless acknowledged that state actors have a measure of responsibility to enforce crime victims' rights.

In *Myers v. Daley*,<sup>198</sup> an Illinois victim attempted on several different occasions to obtain information from the state attorney as to whether the state was going to prosecute his case.<sup>199</sup> The victim finally filed an action to enforce his rights under the Illinois Bill of Rights for Victims and Witnesses of Violent Crime Act.<sup>200</sup> In response to the victim's suit, the state attorney informed the victim of the status of the case, and asked that the victim voluntarily drop his complaint. The victim agreed, but only if the State would agree to pay his court costs of ninety-two dollars and thirty cents.<sup>201</sup> The state attorney refused to pay the costs. The victim, in response, filed a second action requesting an award of the court costs.<sup>202</sup> In reviewing this controversy, the Illinois Court of Appeals ordered the State to pay the victim's costs, noting that to direct otherwise would run counter to the purpose of the Illinois victims' rights act which required that "[u]pon specific request of the victim . . . [the victim should be] informed by law enforcement authorities investigating the case of the status of the investigation."<sup>203</sup> It appeared to the court that "the purpose of the Act would be frustrated if a victim were forced to file suit to learn the status of his case, and were also burdened with the costs of that suit."<sup>204</sup>

In reflecting upon these scattered examples, it appears that while the victims were provided some room to enforce their rights, the scope of this enforcement power was quite limited. A thousand dollar fine,<sup>205</sup> court costs of ninety three dollars and thirty two cents,<sup>206</sup> or liability based only upon "intentional, knowing or grossly negligent"<sup>207</sup> violations of a victims' rights hardly represent formidable sanctions to victims' rights violations.

#### A. Oversight Bodies

In an effort to consistently provide for and oversee the provision of victims' rights laws, several states have established oversight committees or ombudsmen

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197. See 725 ILL. COMP. STAT. § 120/9 (2000).

198. 521 N.E.2d 98 (Ill. App. Ct. 1987).

199. See *id.* at 99.

200. See *id.* The Illinois Bill of Rights for Victims and Witnesses of Violent Crime Act was originally codified in chapter 38, paragraph 1404(1) of the Illinois Revised Statutes (current version at 725 ILL. COMP. STAT. § 120/4 (2000)).

201. See *Myers*, 521 N.E.2d at 99.

202. *Id.* at 100.

203. ILL. REV. STAT. 1985, Ch. 38, para. 1404(1) (current version at 725 ILL. COMP. STAT. ANN. § 120/4 (West 1999 & Supp. 2000)).

204. *Myers*, 521 N.E.2d at 100.

205. See WIS. STAT. § 950.11 (2000).

206. See *Myers*, 521 N.E.2d at 100.

207. ARIZ. REV. STAT. § 13-4437.B (2000).



to review the implementation and enforcement of victims' rights. Colorado has established an oversight committee, through which "[a]ny affected person [except the defendant] may enforce compliance with . . . [the Colorado crime victim compensation and victim and witness rights statute] by notifying the victims compensation and assistance coordinating committee . . . of any noncompliance with this article."<sup>208</sup>

The Colorado Governor's Victims' Compensation and Assistance Coordinating Committee (Coordinating Committee) is made up of seventeen members, including representatives from law enforcement and district attorney's offices, legislators, victims of crime, and other members of the community.<sup>209</sup> The primary goal of the Coordinating Committee

is to provide an unbiased assessment of whether a victim has been afforded his rights under state law [and] 'act as an impartial fact finding and disseminating entity. The coordinating committee is committed to follow[ing] all complaints to resolution and to engage in a process that is accurate, thorough, and responsive to crime victims and to the citizens of Colorado.'<sup>210</sup>

Under the auspices of the Coordinating Committee, a standards subcommittee exists which recommends to the Coordinating Committee the standards criminal justice agencies should be required to follow in providing victims rights.<sup>211</sup>

The Coordinating Committee is charged to "review any such report of noncompliance and if the committee determines that such report of noncompliance has a basis in fact, and cannot be resolved, the committee shall refer such report of noncompliance to the governor, who shall request that the attorney general file suit to enforce compliance with" Colorado's victims rights laws.<sup>212</sup> Additionally, the Coordinating Committee has the "power to investigate . . . [victims' rights laws] violations, and [is] able to recommend action with which the agency must comply to rectify victims' complaints. The . . . committee also may monitor the implementation of those suggestions."<sup>213</sup> If, in the course of investigating a victim's complaint, the Coordinating Committee determines that a victims' rights violation has occurred, the committee "sets forth requirements of the agency in violation."<sup>214</sup> These requirements are "designed to improve . . . [the] current problem and alleviate similar concerns within the

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208. COLO. REV. STAT. § 24-4.1-303(17) (2000).

209. See Office of the Governor-Press Office, *Owens Appoints Nine New Members to Victim's Compensation & Assistance Coordinating Committee* (Jan. 19, 2000), available at [http://www.state.co.us/gov\\_dir/govnr\\_dir/1-19-00a.htm](http://www.state.co.us/gov_dir/govnr_dir/1-19-00a.htm); Office for Victims' Programs, *The Process for Insuring Your Rights*, available at <http://www.cdsweb.state.co.us/ovp/vraVI.htm>.

210. NATIONAL CRIMINAL JUSTICE ASSOCIATION, VICTIMS' RIGHTS COMPLIANCE EFFORTS: EXPERIENCES IN THREE STATES 11 (citation omitted).

211. See *id.* at 7.

212. COLO. REV. STAT. § 24-4.1-303(17) (2000).

213. NATIONAL CRIMINAL JUSTICE ASSOCIATION, *supra* note 210, at 5.

214. Office for Victims' Programs, *supra* note 209.



system on behalf of future victims.”<sup>215</sup>

For example, the Coordinating Committee was once presented with a case in which a victim did not believe she was receiving timely information from county officials about the status of assault case against her estranged husband.<sup>216</sup> After examining the victim's complaint, and conferring with the District Attorney's office, the Coordinating Committee determined that the victim's rights had been violated, and established four requirements with which the District Attorney's office had to comply before the victim's complaint could be dismissed.<sup>217</sup> Pursuant to the directives from the Coordinating Committee, the District Attorney was required to submit

the office's policies and procedures for ensuring that victims' rights are provided; a description of the procedures by which employees ensure that reasonable efforts are made to return victims' phone calls; a description of the policies in place to insure consultation with victims on charges; and the measures undertaken to assure that the victim's rights were being adhered to in the pending case.<sup>218</sup>

After the District Attorney provided the Coordinating Committee with this information, the committee closed the case.<sup>219</sup>

In comparison, Minnesota provides for an ombudsmen to oversee and enforce victims rights.<sup>220</sup> As charged by statute, the Minnesota crime victims' ombudsman investigates “complaints concerning possible violation of the rights of crime victims . . . , the delivery of victim services by victim assistance programs, the administration of the crime victims reparations act, and other complaints of mistreatment by elements of the criminal justice system or victim assistance programs.”<sup>221</sup> Moreover, the ombudsman is commanded to “act as a

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215. *Id.*

216. See NATIONAL CRIMINAL JUSTICE ASSOCIATION, *supra* note 210, at 13.

217. See *id.* at 14.

218. *Id.*

219. See *id.*

220. See MINN. STAT. § 611A.74 (2000). An ombudsman is an individual “acknowledged officially by the government to whom citizens may report mistreatment or grievances resulting from government action or inaction . . . [They] have the power to investigate the allegations of wrongdoing and suggest systematic change to improve the implementation of government programs and delivery of services to citizens.” NATIONAL CRIMINAL JUSTICE ASSOCIATION, *supra* note 210, at 23. Minnesota also has a Crime Victim and Witness Advisory Council, which is charged, in part, to review . . . the treatment of victims by the criminal justice system, . . . advocate necessary changes and monitor victim-related legislation, . . . develop guidelines for the implementation of victim and witness assistance programs and aid in the creation and development of [those] programs, coordinate the development and implementation of policies and guidelines for the treatment of victims and witnesses, and the delivery of services to them . . .

MINN. STAT. § 611A.71.5 (2000).

221. *Id.* § 611A.74.2.



liaison, when the ombudsman deems necessary, between agencies, either in the criminal justice system or in victim assistance programs, and victims and witnesses."<sup>222</sup> Finally, the ombudsman "shall establish a procedure for referral to the crime victim crisis centers, the crime victims reparations board, and other victim assistance programs when services are requested by crime victims or deemed necessary by the ombudsman."<sup>223</sup> In carrying out these duties, the Minnesota crime victims ombudsman has the power to:

investigate, with or without a complaint, any action of an element of the criminal justice system or a victim assistance program . . . prescribe the methods by which complaints are . . . made, received, and acted upon; . . . determine the scope and manner of investigations to be made . . . [and] determine the form, frequency, and distribution of ombudsman conclusions, recommendations, and proposals.<sup>224</sup>

If the ombudsman determines that a victim's complaint is pertinent and requires remedial action, the "ombudsman may recommend action to the appropriate authority."<sup>225</sup> That party, in turn, shall "within a reasonable time period, but not more than 30 days, inform the ombudsman about the action taken or the reasons for not complying with the recommendation."<sup>226</sup> Finally,

the ombudsman may publish conclusions and suggestions by transmitting them to the governor, the legislature or any of its committees, the press, and others who may be concerned. When publishing an opinion adverse to an administrative agency, the ombudsman shall include any statement the administrative agency may have made to the ombudsman by way of explaining its past difficulties or its present rejection of the ombudsman's proposals.<sup>227</sup>

In reflecting upon the work of its office, the Minnesota ombudsman perceives the office as a "problem-solving entity"<sup>228</sup> with the role of

advocating broadly for fairness—[but] not necessarily as an advocate either for the victim or for the criminal justice system. Rather, . . . [the Minnesota ombudsman's mission is] to promote the highest attainable standards of competence, efficiency, and justice for crime victims and witnesses in the criminal justice system. The office exists to discourage mistreatment of crime victims and ensure compliance with statutory protection for crime victims and witnesses.<sup>229</sup>

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222. *Id.*

223. *Id.*

224. *Id.* § 611A.74.3.

225. *Id.* § 611A.74.5(a).

226. *Id.* § 611A.74.5(b).

227. *Id.* § 611A.74.5(c).

228. NATIONAL CRIMINAL JUSTICE ASSOCIATION, *supra* note 210, at 27.

229. *Id.*



However, the power of the Minnesota ombudsman is limited in that it cannot reverse judicial decisions, nor does it have direct control over judicial or executive decision making.<sup>230</sup> Hence, if authorities do not accept the recommendations of the ombudsman, the ombudsman does not have any power to enforce its recommendations or discipline any state actors. Rather, the ombudsman's principal means of remedial action is by making known to the public, via the legislature and the press, an agency's failure to comply with the state's victims' rights laws.<sup>231</sup> Nonetheless, some of the remedies that the ombudsman has been able to effectuate have included

acting as a liaison between citizens and agencies to facilitate communication and understanding between victims and criminal justice practitioners; requesting that an agency issue an apology; reviewing agency or department documentation concerning a specific case to determine whether the agency has treated the citizen appropriately; developing model policies and procedures to help agencies to correct systemic procedures that negatively impact victims; and recommending legislative changes to laws affecting victims of crime.<sup>232</sup>

In conclusion, the Colorado and Minnesota victims' rights enforcement bodies provide examples of entities which, although unable to exercise judicial power to remedy victims' rights violations, are nonetheless able to employ other effective methods to protect victims' rights.

#### *B. Dual Enforcement Mechanisms: Oversight Bodies and Victim Mandate Actions*

Building upon the enforcement body model as employed in Colorado and Minnesota,<sup>233</sup> other states have fashioned dual enforcement mechanisms by coupling the powers of an oversight body with a victim's ability to bring some form of distinct legal action to enforce his or her rights.<sup>234</sup>

In Arizona, a "victim has standing to seek an order or to bring a special action mandating that the victim be afforded any right or to challenge an order denying any right guaranteed to victims under the victims' bill of rights, . . . any implementing legislation or court rules."<sup>235</sup> Crime victims also have the "right to recover damages from a governmental entity responsible for the intentional,

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230. See *id.* at 28 (citations omitted).

231. See *id.*

232. *Id.* at 28-29 (citations omitted).

233. See *supra* Part IV.A.

234. See S.C. CONST. art. I, § 24(B); UTAH CONST. art. I, § 28; S.C. CODE ANN. § 16-3-1620 (Law. Co-op. Supp. 1999); UTAH CODE ANN. § 77-38-11 (West 1999). See also NEV. CONST. art. I, § 8; LA. REV. STAT. ANN. § 46:1844.U (West 1999 & Supp. 2000); N.C. GEN. STAT. § 15A-840 (1999) (providing additional examples of state laws which allow victims to bring a writ of mandamus to enforce their rights).

235. ARIZ. REV. STAT. § 13-4437(A) (2000).



knowing or grossly negligent violation of the victim's rights" <sup>236</sup> under the amendment, legislature or court rules and in some instances, can seek to set aside post-conviction release orders.<sup>237</sup> This latter right, while limited, nonetheless demonstrates a significant shift in the structure of Arizona's criminal justice system, in that it explicitly allows a victim to interject his or her rights or concerns into a criminal action. Consequently, the interests of a third party, the victim, must be considered in conjunction with the interests of the state and the defendant.

In addition to the enforcement rights afforded to Arizona victims by statute, the Arizona Attorney General's Office of Victim Services has established an audit procedure by which it monitors those agencies that implement and provide victims rights.<sup>238</sup> The audit process includes a site visit of the given victim service agency, interviews with staff regarding their knowledge of victim's rights, and surveys of victims rating their satisfaction of services provided by the agency.<sup>239</sup> After the conclusion of the site visit, the Attorney General's Office of Victim Services issues a final report, detailing the agency's views of its own performance, a description of agency procedures for carrying out statutory mandates, conclusions regarding compliance with victims rights statutes and funding program guidelines, and possible suggestions to remedy any problems.<sup>240</sup>

Teena Olszeweski, director of the program, views the audit as a system wide and prospective method of enforcing victim's rights.<sup>241</sup> Olszeweski notes that

[i]t may be a non-traditional mechanism, but it does enforce victims' rights. Our approach to enforcement is pro-active: by auditing complex operations and activities of government agencies, we ensure compliance with duties imposed under our laws. We uncover systemic problems that

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236. *Id.* § 13-4437(B). However, the statute does limit the scope of a victims action by stating that "[n]othing in this section alters or abrogates any provision for immunity provided for under common law or statute." *Id.*

237. *See id.* § 13-4436(B). Under this statute, provided that a prisoner has not been discharged, the "the failure to use reasonable efforts to provide notice and a right to be present or be heard . . . is a ground for the victim to seek to set aside the post-conviction release until the victim is afforded the opportunity to be present or be heard." *Id.* If the victim seeks to have the post-conviction release set aside "the court, board of executive clemency or state department of corrections shall afford the victim a reexamination proceeding after the parties are given notice." *Id.* § 13-4436(C). The reexamination proceeding "shall commence not more than thirty days after the appropriate parties have been given notice that the victim is exercising his right to a reexamination proceeding . . . or to another proceeding based on the failure to perform a duty or provide a right." *Id.* § 13-4436(D).

238. *See Auditing for Compliance in Arizona*, VICTIM POLICY PIPELINE, Fall 2000, at 11. The program was established in 1998, with the hope that auditing victim services agencies would help ensure that rights afforded to victims by law would be carried out in practice. *See id.*

239. *See id.* at 12.

240. *See id.*

241. *See id.* at 13.



can lead to large-scale violations of rights. When we help solve those problems, we prevent further violations. Our program is essentially about accountability.<sup>242</sup>

Moreover, victim service agencies have responded positively to the audit process. As Olszeweski has commented,

This is probably because our goals are similar to the goals of the agencies we audit. No one wants to deny victims of crime their rights, and no one sets out to serve victims poorly. Also, agencies appreciate getting feedback from outside experts, whether we are identifying areas for improvement or acknowledging programs that are doing well.<sup>243</sup>

The benefits of the audit process are obvious, in that it has identified and corrected instances of agency oversight in providing victims their rights. For example, many victims were not receiving information about court date changes in a timely manner from prosecutors.<sup>244</sup> Findings from the audit determined that the prosecutors themselves were not receiving the court date change information in a timely manner, which prevented them from relaying this information to victims.<sup>245</sup> In remedying this problem, the prosecutor's offices, courts, and Attorney General's Office of Victim Services met to establish procedures to "improve notice to prosecutors so [the prosecutors] in turn could better notify victims."<sup>246</sup> Similarly, the audit process revealed that victims of serious misdemeanors were not receiving post-conviction notification.<sup>247</sup> "Prosecutors had interpreted that right to apply only to felony victims. The law in fact applies to victims of both felonies and misdemeanors. Once this was clarified, . . . prosecutors developed a form for victims to request post-conviction notification."<sup>248</sup>

Utah law provides a similar system of dual enforcement for victim's rights. First, victims may bring a variety of special actions to enforce their rights. Pursuant to section 77-38-11 of the Utah Code, "[i]f a person acting under color of state law willfully or wantonly fails to perform duties so that the rights [afforded to victims] are not provided, an action for injunctive relief, including prospective injunctive relief, may be brought against the individual and the government entity that employs the individual."<sup>249</sup> Moreover,

[t]he victim of a crime or representative of a victim of a crime, including any Victims' Rights Committee . . . may: . . . bring an action for declaratory relief or for a writ of mandamus defining or enforcing the

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242. *Id.*

243. *Id.*

244. *Id.*

245. *See id.*

246. *Id.*

247. *See id.*

248. *Id.*

249. UTAH CODE ANN. § 77-38-11(1) (2000).



rights of victims and the obligations of government entities . . . [and] petition to file an amicus brief in any court in any case affecting crime victims.<sup>250</sup>

Finally, the statute also permits a victim or the victim's representative to appeal an adverse ruling of an action brought under the statute.<sup>251</sup>

Victims may also defer to the Victims' Rights Committee for enforcement of their rights.<sup>252</sup> As dictated by statute, the Victims' Rights Committee is required to meet "at least semiannually to review progress and problems related to" Utah's victims' rights amendment and laws.<sup>253</sup> Victims can submit issues or matters of concern to the committee, which can in turn hold open meetings and publish its findings on any issue raised by a victim.<sup>254</sup> Finally, the committee is required to "forward minutes of all meetings to the Commission on Criminal and Juvenile Justice and the Office of Crime Victims' Reparations for review and other appropriate action."<sup>255</sup>

South Carolina provides a comparable model for enforcing victims' rights. South Carolina law prohibits a victim from bringing a "civil cause of action against any public employee, public agency, the State or any agency responsible for the enforcement of rights and provision" of victim rights<sup>256</sup> and similarly limits a victim's ability to invalidate a sentence as a result of the State's failure to comply with South Carolina's victims' rights laws.<sup>257</sup> However, victims are entitled to bring a writ of mandamus to "require compliance by any public employee, public agency, the State, or any agency responsible for the enforcement of the rights and provisions of [South Carolina's victims rights laws]."<sup>258</sup> Moreover, "willful failure to comply with a writ of mandamus is punishable as contempt."<sup>259</sup>

South Carolina has also created a Crime Victims' Ombudsman of the Office of the Governor.<sup>260</sup> The South Carolina ombudsman extends multiple services to members of the victim's rights community. The ombudsman provides a forum for victims to raise compliance complaints while simultaneously serving as a clearinghouse that refers victims to proper sections of the criminal justice system.<sup>261</sup> Additionally, the office acts as a liaison between different elements

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250. *Id.* § 77-38-11(2)(a).

251. *See id.* § 77-38-11(2)(b).

252. *See id.* § 77-37-5.

253. *Id.* § 77-37-5(2).

254. *See id.*

255. *Id.*

256. S.C. CONST. art. I, § 24(B); *see also* S.C. CODE ANN. § 16-3-1565(A) (Law Co-op. Supp. 1999).

257. *See* S.C. CODE ANN. § 16-3-1565(B) (Law. Co-op. Supp. 1999).

258. S.C. CONST., art I, § 24(B).

259. *Id.*

260. *See* S.C. CODE ANN. § 16-3-1620 (Law. Co-op Supp. 1999).

261. *See id.* §§ 16-3-1620(B)(1) and (3).



of the criminal justice system and victims.<sup>262</sup>

When acting as a forum for victim complaints, the ombudsman is required to forward copies of the a victim's complaint to the "person, program, and agency against whom . . . [the victim] makes allegations, and conduct an inquiry into the allegations stated in the complaint."<sup>263</sup> In responding to the complaint, the ombudsman is authorized to

request and receive information and documents from the complainant, elements of the criminal and juvenile justice systems, and victim assistance programs that are pertinent to the inquiry. Following each inquiry, the ombudsman shall issue a report verbally or in writing to the complainant and the persons or agencies that are the object of the complaint and recommendations that in the ombudsman's opinion will assist all parties. The persons or agencies that are the subject of the complaint shall respond, within a reasonable time, to the ombudsman regarding actions taken, if any, as a result of the ombudsman's report and recommendations.<sup>264</sup>

However, in similar fashion to the limits placed on a victim's right to bring a writ of mandamus,<sup>265</sup> "[a] victim's exercise of rights . . . [through the ombudsman] is not grounds for dismissing a criminal proceeding or setting aside a conviction or sentence."<sup>266</sup>

One cannot escape the reality that where the writ of mandamus is sanctioned by statute as an adversarial method to enforce victims' rights, its power is restricted by other limits on a victim's ability to reestablish herself in the criminal process. However, despite these acknowledged challenges, the formal statutory grant of action to a victim, coupled with the efforts of an oversight committee or victims' rights ombudsman, creates an environment in which a victim is far more likely to be successful in bringing a victims' rights claim.

## V. INCREASING THE POWER OF INDIANA'S VICTIMS' RIGHTS LAWS

The State of Indiana should adopt a dual model of victims' rights enforcement, combining the forces of a victims' rights ombudsman with a writ of mandamus to insure that Indiana victims have a variety of mechanisms to enforce their rights.

### A. *Creation of an Ombudsman*

The role of an ombudsman is not a foreign concept to Indiana lawmakers. Currently, the state has at least three ombudsmen charged with responding to and

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262. See *id.* § 16-3-1620(B)(2).

263. *Id.* § 16-3-1630. The ombudsman must first receive a "written complaint that contains specific allegations and is signed by a victim" of crime in the state. *Id.*

264. *Id.*

265. See *supra*, notes 248-49, and accompanying text.

266. S.C. CODE ANN. § 16-3-1660 (Law. Co-op Supp. 1999).



investigating complaints regarding health and legal services to the elderly, disabled, and mentally ill.<sup>267</sup>

First and foremost, Indiana's ombudsmen help centralize the process by which the state responds, investigates, and resolves complaints registered by citizens who receive specialized state services. For example, the statewide waiver ombudsman is commanded to "[p]romote effective coordination among . . . [p]rograms that provide legal services for the developmentally disabled. . . , the division [of disabilities] . . . ; [p]roviders of waiver services to individuals with developmental disabilities; [and] providers of other necessary or appropriate services."<sup>268</sup> The long term care ombudsman has similar coordination duties and is charged by statute to

[p]romote the effective coordination between the office and . . . (A) [p]rograms that provide legal services for the elderly . . . (B) [t]he adult protective services program . . . (C) [t]he attorney general's division of Medicaid fraud . . . (D) [t]he state department of health . . . [and] (E) Indiana protection and advocacy services.<sup>269</sup>

Following naturally from their role as oversight coordinators, Indiana's ombudsmen are also commanded by statute to investigate citizen complaints in regard to services provided by the state to the mentally ill, the aging, and those who are developmentally disabled.<sup>270</sup> In investigating complaints, the mental health ombudsman must

[a]t the request of a mental health patient, or upon receiving a complaint or other information affording reasonable grounds to believe that the rights of a mental health patient who is not capable of requesting assistance have been adversely affected, gather information about, analyze, and review on behalf of the mental health patient, the actions of an agency, a facility, or a program.<sup>271</sup>

Likewise, the long term care ombudsman

. . . shall receive, investigate, and attempt to resolve complaints and concerns that . . . are made by or on behalf of a patient, resident, or client of a long term care facility or a home care service . . . and involve the health, safety, welfare, or rights of a resident or client.<sup>272</sup>

267. See IND. CODE §§ 12-10-13-4 to -20 (2000) (long term care ombudsman program); § 12-11-13-1 to -16 (statewide waiver ombudsman); § 12-27-9-4 to -6 (mental health ombudsman program). To assist in receipt of complaints, each ombudsman is required to establish a toll free telephone number to which individuals can register complaints. See *id.* § 12-10-13-16.8(2); § 12-11-13-15; § 12-27-9-5.

268. *Id.* § 12-11-13-10.

269. *Id.* § 12-10-13-16.8(1).

270. See *id.* §§ 12-27-9-4(a)(4), 12-10-13-14, 12-13-13-6.

271. IND. CODE § 12-27-9-4(a)(4) (2000).

272. *Id.* § 12-10-13-14 (long term care ombudsman program). Similar investigation duties are



Additionally, in the course of investigating complaints, the ombudsmen keep complainants informed of investigation results,<sup>273</sup> and make recommendations to the relevant agencies involved in the party's complaint. For example, "[i]f after (1) reviewing a complaint; (2) considering the response of an agency, a facility, or a program; and (3) considering any other pertinent material the mental health ombudsman determines that the complaint has merit, the ombudsman may make recommendations to that agency, facility, or program."<sup>274</sup> Similarly, the mental health ombudsman can request that the "agency, facility or program shall . . . inform the ombudsman about the action taken on the ombudsman's recommendation . . . or the reasons for not complying with the ombudsman's recommendation."<sup>275</sup> If the mental health ombudsman "believes that the agency, facility, or program has failed to comply with the ombudsman's recommendations, the ombudsman shall refer the matter to the division of mental health or the Indiana protection and advocacy services commission as appropriate."<sup>276</sup> Finally, in similar fashion to the reporting requirements imposed on the long term care ombudsman and the state wide waiver ombudsman,<sup>277</sup> the mental health ombudsman must "maintain records of all activities on behalf of consumers and report all findings to the division on a quarterly basis."<sup>278</sup>

Following its trend of creating health care and disabilities ombudsmen, the Indiana legislature should establish a victims' rights ombudsman with coordinating, investigatory, recommending, and reporting powers similar to the powers granted to Indiana's current ombudsmen. First, since Indiana victims are afforded specific rights by constitutional amendment<sup>279</sup> and by statute,<sup>280</sup> an ombudsman could help ensure that victims were aware of their rights, and had a forum in which they could seek to review and redress any alleged violations.<sup>281</sup>

required of the Statewide Waiver Ombudsman. *See id.* § 12-11-13-6(a).

273. *See id.* § 12-10-13-14 (ombudsman shall report findings to complainant); § 12-10-13-16 (ombudsman must inform complainant when office decides not to investigate complaint); § 12-11-13-6(b) (ombudsman shall report findings to complainant); § 12-11-13-6(c) (ombudsman must inform complainant when office decides not to investigate complaint).

274. *Id.* § 12-27-9-5(b).

275. *Id.* § 12-27-9-5(c).

276. *Id.* § 12-27-9-6(a).

277. *See id.* §§ 12-10-13-19 (long term care ombudsman must issue annual report to governor, general assembly, division, federal Commissioner on Aging, area agencies on aging, and state department of health ), 12-11-13-13 (statewide waiver ombudsman must issue annual report to governor, legislative counsel, division and members of Indiana commission on mental retardation and developmental disabilities).

278. *Id.* § 12-27-9-4(b).

279. *See* IND. CONST. art. I, § 13(b).

280. *See id.* § 35-40-1 to -13.

281. While established as an oversight committee rather than an ombudsman, the Colorado Governor's Victims' Compensation and Assistance Coordinating Committee notes that one of the important aspects of its work is to ensure that victims understand the scope of their rights, and what



Second, in investigating victim complaints and recommending possible remedial action, the victims' rights ombudsman could "provide an unbiased assessment of whether a victim has been afforded his rights under state law and . . . [and] 'act as an impartial fact finding and disseminating entity'"<sup>282</sup> while simultaneously "advocating broadly for fairness . . . prompt[ing] the highest attainable standards of competence, efficiency, and justice for crime victims and witnesses in the criminal justice system."<sup>283</sup> Finally, the ombudsman could "act as a liaison . . . between agencies, either in the criminal justice system or in victim assistance programs, and victims and witnesses."<sup>284</sup>

In its capacity as a liaison or coordinator, the Indiana victims' rights ombudsman should also instigate some form of audit procedure, similar to the one practiced by the Arizona Attorney General's Office of Victim's services.<sup>285</sup> Such an audit procedure would provide a proactive and preventative approach to enforcing and protecting victims' rights. "[B]y auditing complex operations and activities of government agencies, . . . [the ombudsman could] ensure compliance with duties imposed under . . . [Indiana] laws . . . . [The ombudsman could] uncover systemic problems that . . . [might] . . . lead to large-scale violations of rights."<sup>286</sup> In solving those problems, the ombudsman would help prevent further violations of victims' rights.<sup>287</sup>

### *B. Actions for Mandate*

The Indiana legislature should equally be encouraged to amend the current victims' rights legislation to specifically allow victims to bring actions for mandate to protect their rights. Under the present status of Indiana law, victims do have standing to enforce their rights,<sup>288</sup> but the scope of that enforcement power is limited and undefined.<sup>289</sup>

Commonly termed "writ of mandamus," Indiana law dictates that

[c]auses of action previously remedied by writs of mandate may be remedied by means of complaint and summons in the name of the state on relation of the party in interest in the circuit, superior, and probate courts as other civil actions. Such actions are to be known as actions for mandate.<sup>290</sup>

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results they should expect from any review procedure. See NATIONAL CRIMINAL JUSTICE ASSOCIATION, *supra* note 210, at 12.

282. *Id.* at 11.

283. *Id.* at 27.

284. MINN. STAT. § 611A.74.2 (1999).

285. See *supra* notes 238-48, and accompanying text.

286. *Auditing for Compliance in Arizona*, *supra* note 238, at 13.

287. See *id.*

288. See IND. CODE § 35-40-2-1 (2000).

289. See *supra* Part III.B.

290. IND. CODE § 34-27-1-1 (1999).



It is long established that an action for mandate is an "extraordinary remedy expressly provided for by statute"<sup>291</sup> which should be "issued *only* where the trial court [or other party] has an absolute duty to act or refrain from acting."<sup>292</sup> Likewise, "[b]ecause they are extraordinary remedies, such writs will not be issued unless the . . . [party bringing the action] can show a clear and obvious emergency where the failure of . . . [the] [c]ourt to act will result in substantial injustice."<sup>293</sup> Finally, actions for mandate cannot be used as a substitute for appeal.<sup>294</sup>

In examining Indiana's current use of actions for mandate, it is evident that such an action would contribute to victims' efforts to enforce their rights. Section 34-27-3-1 of the Indiana Code states that "[a]n action for mandate may be prosecuted against any inferior tribunal, corporation, public or corporate officer, or person to compel the performance of any: (1) act that the law specifically requires; or (2) duty resulting from any office, trust, or station."<sup>295</sup> In rendering a judgment in an action for mandate, the court will either issue "a prohibition absolute, restraining the [lower] court and party from proceeding; or authorizing the court and party to proceed . . . in the matter in question."<sup>296</sup>

When determining whether to grant an action for mandate, the Indiana courts have carefully examined whether the party charged has an "absolute duty to act or refrain from acting."<sup>297</sup> For example, in *Perry Township v. Hedrick*,<sup>298</sup> commissioners determined that Hedrick was entitled to poor relief assistance in satisfying her utility payments, and subsequently ordered the Perry Township trustee to pay Hedrick's overdue electric bill.<sup>299</sup> When the trustee failed to comply with the commissioner's order, Hedrick filed a petition for mandate, seeking the court to order the trustee to pay the electric bill.<sup>300</sup> In challenging the trial court's grant of Hedrick's action for mandate, the trustee argued, in part, that it was not subject to a clear legal duty to pay Hedrick's bill.<sup>301</sup> The Indiana Supreme Court concluded otherwise, finding the trustee's mandatory duty to comply with the commissioner's order in the language of Indiana Code section

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291. *E.g.*, *Moore v. Smith*, 390 N.E.2d 1052, 1054 (Ind. Ct. App. 1979).

292. *City of New Haven v. Allen* Superior Court, 699 N.E.2d 1134, 1136 (Ind. 1998) (emphasis added). *See also* *State ex rel. W.A. v. Marion County Superior Court*, 704 N.E.2d 477, 478 (Ind. 1998); *State ex rel. Ind. State Bd. of Fin. v. Marion County Superior Court*, 396 N.E.2d 340, 343 (Ind. 1979); *State ex rel. Bicanic v. Lake Circuit Court*, 292 N.E.2d 596, 598 (Ind. 1973); *Perry Township v. Hedrick*, 429 N.E.2d 313, 316 (Ind. Ct. App. 1981).

293. *City of New Haven*, 699 N.E.2d at 1136.

294. *See id.* at 1135-36.

295. IND. CODE § 34-27-3-1 (2000).

296. *Id.* § 34-27-2-2.

297. *City of New Haven*, 699 N.E.2d at 1136.

298. 429 N.E.2d 313 (Ind. Ct. App. 1981).

299. *See id.* at 315.

300. *See id.*

301. *See id.* at 317.



12-2-1-18.<sup>302</sup> The court noted that pursuant to the code,

the trustee 'shall' carry out the decision of the Commissioners. The term 'shall' in a statute is ordinarily to be used in its mandatory sense. We do not think that the stated purpose of the act [to provide necessary and prompt financial relief to citizens of Indiana] would be furthered . . . by permitting the trustee to suspend his mandatory duty to comply with the Commissioners' order . . . .<sup>303</sup>

Therefore, the court determined that the trustee did have a duty to comply with the commissioner's order and pay Hedrick's bill.

Conversely, in *State ex rel. Indiana State Board of Finance v. Marion County Superior Court, Civil Division*,<sup>304</sup> the Indiana Supreme Court rejected a crime victim's action for mandate seeking an order for the Indiana Rehabilitation Services Board to fund the administration of the Indiana Violent Crime Compensation Division.<sup>305</sup> The court reasoned that "while the Violent Crime Compensation Division is set up under mandatory statutes, there is no provision for the mandatory funding of it"<sup>306</sup> and hence the victim's petition, and the lower court's ruling ordering the State Finance Board or State Budget Agency to use their discretionary powers to fund the Division, was inappropriate.<sup>307</sup>

As these cases indicate, the command of statute is crucial in establishing whether a mandatory duty to compel a public officer, court, or other party to take action exists. Such commanding language is present in Indiana's victims' rights laws.

For example, "[t]he law enforcement agency having custody of a person accused of committing a crime against a victim *shall* notify the victim if the accused person escapes from the custody of the law enforcement agency."<sup>308</sup> Similarly, "a criminal court *shall* notify the victim of any probation revocation disposition proceeding or proceeding in which the court is asked to terminate the probation of a person who is convicted of a crime against the victim."<sup>309</sup> Courts must provide similar notice to the victim if the defendant is released, discharged or has escaped from a mental health treatment agency.<sup>310</sup> Finally, prosecutors are

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302. See IND. CODE § 12-2-1-18 (repealed 1992).

303. *Perry Township v. Hedrick*, 429 N.E.2d 313, 317 (Ind. Ct. App. 1981) (citations omitted).

304. 396 N.E.2d 340 (Ind. 1979)

305. See *id.* at 342-43. The victim had filed a claim for compensation with the Violent Crime Compensation division, but was informed that the processing of his claim was delayed due to a lack of funding for the division. See *id.* at 342.

306. *Id.* at 343.

307. See *id.*

308. IND. CODE § 35-40-7-1 (2000) (emphasis added).

309. *Id.* § 35-40-8-1 (emphasis added).

310. See *id.* § 35-40-9-1 to -3. Generally, if the victim has requested notice of release of a defendant from a mental health treatment agency, the agency must provide notice to the court, and the court must give the victim notice no later than ten (10) days before the discharge or release of the defendant. See *id.* § 35-40-9-1.



charged with providing victims with a variety of information, including the time of all "hearings and proceedings that are scheduled for a criminal matter in which the victim was involved,"<sup>311</sup> and if a defendant is convicted, and the victim has so requested, the prosecutor must notify the victim regarding his or rights during the sentencing phase of the trial, including the time, place, and date of the sentencing proceeding.<sup>312</sup>

Based upon these clearly delineated statutory duties, it is manifestly appropriate that a victim should be able to bring an action for mandate to enforce his or her rights. Denying victims the opportunity to require prosecutors, the courts and other statutorily commanded bodies to comply with Indiana's victims' rights laws would result in an obvious and "substantial injustice." Hence, it is exceedingly appropriate that victims be afforded this remedy under the current structure of Indiana's victims' rights laws.

Despite the additional power an action for mandate would provide to victims seeking to enforce their rights, one must nonetheless remain mindful of the limited force that such a writ will have. "For example, it would not apply to solicitors once a victim's case is closed. Furthermore, the enforcement provision would fail to protect a victim if prison officials fail to notify the victim that the person charged or convicted for the crime has been released."<sup>313</sup> Additionally, victims would most likely be barred from using the action to "challenge a charging decision or a conviction, obtain a stay of trial, or compel a new trial"<sup>314</sup> in light of an alleged victims rights violation. Hence, if a victim did not attend a sentencing hearing and exercise his right to be heard<sup>315</sup> because the prosecutor did not give the victim notice of the proceeding,<sup>316</sup> the victim would not be able to bring an action for mandate commanding the court to conduct a second sentencing hearing.

However, such limits should not dissuade the Indiana legislature from adding a provision to Indiana's current victims' rights laws allowing victims to bring actions of mandate to enforce their rights. In concert with creating a victims' rights ombudsman, the legislature should pass a statute dictating that "[t]he victim of a crime or representative of a victim of a crime, including the [victims' rights ombudsman] may: bring an action for. . . [mandate] enforcing the rights of victims and the obligations of government entities under [Indiana's victims' rights statute]."<sup>317</sup> By so doing, the legislature would provide an additional tool

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311. *Id.* § 35-40-6-4.

312. *See id.* § 35-40-6-7; *see also supra* Part III.B.3.

313. Westbrook, *supra* note 9, at 585.

314. IND. CODE § 35-40-2-1(1).

315. *See id.* § 35-40-5-5.

316. *See id.* § 35-40-5-9.

317. UTAH CODE ANN. § 77-38-11(2)(a) (1999). Conversely, the Indiana legislature might chose to pattern its action for mandate language after South Carolina law which dictates that victims are entitled to bring a writ of mandamus to "require compliance by any public employee, public agency, the State, or any agency responsible for the enforcement of the rights and provisions of [South Carolina's victims rights laws]." S.C. CONST. art. 1, § 2.4(B).



to aid Indiana victims in securing and enforcing their rights.

### CONCLUSION

The pendulum charting the victim's place within American criminal law is moving. While victims were once peripheral actors in the prosecutorial process, they now hold a far less marginalized position within the boundaries of the criminal justice system. Laws granting victims such rights as notice, presence and being heard, have all helped in shifting the victims' rights pendulum to a new position. The state of Indiana has equally contributed to this process.

Indiana's own victims' rights amendment,<sup>318</sup> and supporting legislation,<sup>319</sup> exemplify and highlight the state's commitment to reintegrating the victim into the prosecutorial system. However, the ruling in *Newman*,<sup>320</sup> coupled with the results of victims' rights enforcement actions in other states, illustrates the numerous challenges that still surround enforcing victims' rights. Several states have responded to this challenge by establishing victims' oversight committees or ombudsmen to coordinate and review victims' rights services. Similarly, some states have formally sanctioned the writ of mandamus as a direct, albeit limited, judicial remedy for the enforcement of victims' rights violations. While neither of these systems can ensure a state's complete, unfettered, and consistent compliance with victims' rights laws, they nonetheless represent a tangible and cogent way for victims' rights claims to be heard, addressed, and reviewed. Therefore, the Indiana state legislature should be strongly encouraged to adopt a dual enforcement model, combining the forces of a victim's right to use an action for mandate with a victims' rights ombudsman.

While the American criminal justice system may never be able to remedy the ultimate violation an individual experiences when they become a victim of crime, the slow, careful, and appropriate reentry of the victim into the fold of criminal justice provides all individuals with the opportunity to acknowledge that the harms committed against the victim were indeed committed against all of society. Therefore, providing for and enforcing the manner by which victims participate in the criminal justice process should be fiercely championed and protected.

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318. See IND. CONST. art. I, § 13(b).

319. See IND. CODE ANN. § 35-40-1 to -13 (2000).

320. *Newman v. Ind. Dep't of Corr.*, No.49D01-9910-CP-1431 (Marion Super. Ct., Ind. dismissed, Jan. 18, 2000).



















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